89-1310

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

PATRICK T. REID,
Petitioner

-vs-

WHITE MOTOR CORPORATION and JOHN T. GRIGSBY, JR.,
Disposition Assets Trustee of White Motor Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. At what point in time, if any, is a person seeking to file a class proof of claim in a bankruptcy case required to seek the bankruptcy court's authority to certify the class of claimants, and apply Bankruptcy Rule 7023 and F.R.Civ.P., Rule 23 to determine whether the class can be certified?

II. Must a person filing a class proof of claim file a disclosure statement complying with the provisions of Bankruptcy Rule 2019, and does the failure to file the Bankruptcy Rule 2019 disclosure statement constitute grounds for the disallowance of the class proof of claim?

III. Must a person filing a class proof of claim obtain special authority from the class members to file the bankruptcy proof of claim on their behalf before or after the filing of a class proof of claim, or can the bankruptcy court's certification of the class provide the necessary authority?

IV. If a person filing a class proof of claim must obtain actual authority from the class members to file a proof of claim on their behalf, can the certification of the class of claimants as plaintiffs in a prior proceeding suffice as authority for the filing of a bankruptcy proof of claim?

V. Did the Bankruptcy Court below abuse its discretion by refusing to allow the Petitioner to amend his proof of claim to comply with the procedural requirements for the filing of class proofs of claim?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Patrick T. Reid, respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on September 28, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 886 F.2d 1462 (6th Cir. 1989). It also appears in the separate Appendix hereto at p. A-4. The Court of Appeals' Order Denying Petition for Rehearing is not reported and is reprinted at A-1. The opinion of the District Court is reported at 65 Bankr. 383 and is also reprinted at A-26. The opinion of the Bankruptcy Court granting summary judgment against the Petitioner is unreported and appears in the Appendix at A-42. The opinion of the Bankruptcy Court denying the Petitioner's post-trial motions is unreported and appears in the Appendix at A-46.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1989. On October 12, 1989, the Petitioner filed with the Court of Appeals below his Petition for Rehearing and Suggestion for Rehearing En Banc. The Court of Appeals entered its Order Denying Petition for Rehearing En Banc on November 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, FEDERAL RULES OF CIVIL PROCEDURE AND BANKRUPTCY RULES INVOLVED

This action involves the application of 11 U.S.C. § 502, FED.R.CIV.P. 23, Bankruptcy Rule 2019, Bankruptcy Rule 7023, and Bankruptcy Rule 9014, all of which are reprinted in the Appendix beginning at p. A-48.

STATEMENT OF THE CASE

This case is presently before the Court because the Bankruptcy Court for the Northern District of Ohio disallowed the bankruptcy Proof of Claim of the Petitioner, Patrick Reid ("Reid") in the Chapter 11 Bankruptcy case of White Motor Corporation (the "Debtor"). The Amended Proof of Claim, in the amount of $3,033,515.67, was filed by Reid, an attorney, on behalf of 264 former employees of the Debtor at its Diamond REO Truck plant located in Lansing, Michigan.

The Debtor is a manufacturer of large trucks. At the time it filed its Chapter 11 bankruptcy petition in the Ohio Bankruptcy Court on September 4, 1980, the Debtor's bankruptcy case was one of the largest ever filed in Ohio.

The claims of the individual employees represented by Reid arose from the sale of White Motor's Diamond REO Truck Division to Diamond Reo Truck, Inc. (the "Purchaser") in 1971. After the sale, all of these employees were terminated. Although Diamond Reo Truck, Inc. assumed all of the liabilities of White Motor's Diamond Reo Truck Division, the Purchaser filed its own bankruptcy petition in the Bankruptcy Court for the Western District of Michigan shortly after the sale.

After the sale of the Debtor's Diamond Reo Division, but before the Purchaser filed its own bankruptcy petition, Reid represented the individual employees in a class action lawsuit in Michigan state court, where the former employees were certified by the state court as a plaintiff class. The employees that were represented by Reid affirmatively opted into the plaintiff class in the Michigan state court litigation, as was required by the applicable Michigan Court Rule, GCR 208 (1963).

The $3,033,515.67 claim filed by Reid is based upon the contractual severence pay owned by the Debtor to the 264 former employees of the Debtor's Diamond Reo Truck Division. Reid filed the initial Proof of Claim on September 1, 1981, at a very early stage of the in the Debtor's Bankruptcy Case. Reid's initial bankruptcy Proof of Claim was typed on the standard proof of

claim form used by the Ohio Bankruptcy Court. The Proof of Claim explicitly stated that Reid "is the agent of all Class Members of a certain class action filed in the Ingham County Circuit Court, File No. 77-19932-CK, and is authorized to make this Proof of Claim on behalf of Claimant." Attached to the Proof of Claim were eight pages listing the names of the former employees of the Debtor's Diamond REO Truck Division represented by Reid in the state court class action lawsuit, along with the amount claimed by each employee. The attachments to the Proof of Claim indicated that the claims of the individual employees arose on account of "severence pay." The total amount of the employees' claims at the time the initial Proof of Claim was filed, $1,743,233.05, is explicitly indicated on the face of the Proof of Claim, and is equal to the total of the specific amounts per employee set out in the attachments.

On June 29, 1982, Reid filed his First Amended Proof of Claim in the Ohio Bankruptcy Court, to amend and clarify the initial Proof of Claim filed on September 1, 1981. The First Amended Proof of Claim explicitly indicated on its face that the employees' claims arose on account of "severence pay," and, like the initial Proof of Claim, the First Amended Proof of Claim listed, on attachments, the employees that asserted severence pay claims, as well as the amount claimed by each employee. The amount claimed by each employee was somewhat higher than the amount claimed in the initial Proof of Claim, and the higher total, $3,033,515.67, was again explicitly shown on the face of the First Amended Proof of Claim.

None of the employees listed on Reid's Proof of Claim or his First Amended Proof of Claim filed an individual proof of claim on his own behalf in the Debtor's bankruptcy case.

The Bankruptcy Court below entered an order setting August 30, 1983 as the bar date for filing proofs of claim. Both Reid's September 1, 1981 Proof of Claim and his June 29, 1982 First Amended Proof of Claim were filed many months before the August 30, 1983 bar date. Neither the Debtor nor the bankruptcy trustee appointed by the Court, John T. Grigsby, Jr. (the "Trus-

tee"), objected to the form or content of the Proof of Claim or the First Amended Proof of Claim (both of which together are referred to hereafter as the "Proof of Claim," or "Claim No. 188".) until just after the expiration of the bar date. The Trustee's Objection to Claim No. 188 was filed on September 20, 1983.

The Trustee moved for summary judgment to disallow the Proof of Claim on the grounds that the Proof of Claim was, in the Trustee's view, an impermissable attempt to file a "class claim." According to the Trustee, because the Debtor's former employees had not acted to certify their claims as a class claim in the Bankruptcy Court before the time that the Trustee filed his objections to the claim, they were forever barred from asserting their claims at all in the Debtor's bankruptcy case.

On June 20, 1985, the Bankruptcy Court below entered its Order granting the Trustee's Motion for Summary Judgment.[1] Specifically, the Bankruptcy Court held that "class actions [are] inappropriate to claim proceedings." (Appendix, p. A-43). The Bankruptcy Court declined to order Bankruptcy Rule 7023 (governing class actions in the Bankruptcy Court) applicable to the Proof of Claim because class actions are "generally disfavor[ed]" in bankruptcy courts, and because Reid did not seek the application of Bankruptcy Rule 7023 to the Proof of Claim before the Proof of Claim was filed. (Appendix, pp. A-43-A-44). As a result, the Bankruptcy Court disallowed the Proof of Claim altogether.

Reid filed his Motion for Reconsideration of the Bankruptcy Court's Order granting summary judgment on July 22, 1985, as well as a Motion to Consider Claim Properly Filed by Individual Claimants, or to Permit Amendment of Claim, or to File Tardy Claims. Reid also filed at the same time a separate Motion Under Bankruptcy Rule 9014 to Apply Part VII of the Bankruptcy Rules in This Contested Matter, which sought specifically to apply FED.R.CIV.P. 23, governing class actions, to the Proof of Claim.

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[1] The Bankruptcy Court's federal jurisdiction to consider the disallowance of the Proof of Claim was based upon 11 U.S.C. § 1334 and 11 U.S.C. § 157(b)(2)(B).

On September 11, 1985, the Bankruptcy Court entered its Order rejecting all of the relief requested in Reid's July 22, 1985 motions. The Bankruptcy Court denied Reid's Motion for Reconsideration on the grounds that the Motion raised only arguments that were already raised in response to the Trustee's Motion for Summary Judgment. (Appendix, p. A-46). The Bankruptcy Court denied the Motion to Consider Claim Properly Filed on the grounds that "class actions cannot be maintained to circumvent the requirement of filing individual claims." (Appendix, p. A-47). Further, the Bankruptcy Court held that it could not allow the Proof of Claim to be amended to conform to the individual claims requirement because, after the Trustee's Motion for Summary Judgment was granted, there was no claim left to amend, and any order allowing such an amendment would be "inoperative." (Appendix, p. A-47).

On September 20, 1985, Reid filed his Notice of Appeal whereby he sought to appeal to the District Court the Bankruptcy Court's orders granting the Trustee's motion for summary judgment and denying Reid's post-judgment motions. The District Court dismissed Reid's appeal of the Bankruptcy Court's Order granting the Trustee's motion for summary judgment on the grounds (subsequently reversed by the Court of Appeals) that Reid's Notice of Appeal was untimely. (Appendix, pp. A-36-A-37). Thus, the District Court did not consider the merits of the Bankruptcy Court's Order granting summary judgment. The District Court further found that the Bankruptcy Court had not abused its discretion in denying the Motions filed by Reid after the Trustee's Motion for Summary Judgment was granted. (Appendix, pp. A-37-A-41). Reid appealed the District Court's Judgment to the Court of Appeals for the Sixth Circuit on November 25, 1987.

The Court of Appeals reversed many of the legal conclusions reached by both the Bankruptcy Court and District Court below. For one thing, the Court of Appeals found that Reid's appeal of the Bankruptcy Court's Order granting the Trustee's Motion for Summary Judgment was timely. (Appendix, p. A-16).

More importantly though, the Court of Appeals rejected the Bankruptcy Court's principal reason for disallowing the Proof of Claim. The decision of the Court of Appeals announced for the first time in the Sixth Circuit that a class proof of claim is permissible under certain circumstances in bankruptcy cases. (Appendix, pp. A-17-A-20). After reaching this watershed decision, however, the Court of Appeals held that the Bankruptcy Court below did not, in any event, abuse its discretion in disallowing the class proof of claim filed by Reid. The Court of Appeals held that Reid failed to comply with the following prerequisites to the Bankruptcy Court's applying Bankruptcy Rule 7023 to the Reid Proof of claim and certifying the class of claimants:

> A) Reid failed to file a timely motion with the Bankruptcy Court, pursuant to Bankruptcy Rule 9014, to request the Bankruptcy Court to apply Bankruptcy Rule 7023 to the Reid proof of claim and certify the class of persons claiming through the Reid proof of claim;
>
> B) Reid failed to file a statement that strictly met the requirements of Bankruptcy Rule 2019, disclosing his representation of more than one creditor in the bankruptcy case;
>
> C) Reid did not prove that he was actually authorized by the class members or under applicable law to file a proof of claim on their behalf; and
>
> D) Reid did not sufficiently identify the class. (Appendix, pp. A-21-A-23).

REASONS FOR GRANTING THE WRIT

Because of the importance of the Court of Appeals' decision allowing class proofs of claim for the first time in bankruptcy proceedings, it is extremely important that the Court provide proper guidance to courts in all Circuits and to practitioners as to precisely what procedure must be followed by class claimants in

order to avoid having future class claims disallowed on mere technical grounds, as has happened in the instant case.

Further, the Court of Appeals' disposition of the class proof of claim in the instant case on the grounds that Reid failed to comply with the procedural requirements of Bankruptcy Rules 2019, 7023, and 9014 directly conflicts with the interpretation given these Bankruptcy Rules by the two other Courts of Appeals which have found that class proofs of claim are allowable in bankruptcy cases. *See, In re Charter Co.*, 876 F.2d 866 (11th Cir. 1989); *Matter of American Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988). The Court should note that these two cases, together with the opinion of the Court of Appeals for the Sixth Circuit below, are the only opinions at the Circuit Court level which have determined that class proofs of claim may be filed in bankruptcy cases. These three opinions stand in conflict with the decision of the Court of Appeals for the Tenth Circuit in *In re Standard Metals Corp.*, 817 F.2d 625 (10th Cir. 1987), vacated in part on rehearing and decided on other grounds, *sub nom Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383 (10th Cir. 1987). In *Standard Metals*, the Tenth Circuit declared that class proofs of claim can never be allowed in bankruptcy cases to supplant the supposed requirement that individual claims be filed by creditors. *Standard Metals*, 817 F.2d, at 632.

Before these very recent opinions by the Sixth, Seventh, Tenth, and Eleventh Circuit Courts of Appeals, the case law in the various bankruptcy and district courts almost invariably disallowed class proofs of claim. Because the allowance of class proofs of claim in bankruptcy cases has only very recently been sanctioned, and because there is a conflict between the Court of Appeals for the Sixth Circuit below and the Courts of Appeals for the Eleventh Circuit and Seventh Circuit as to the procedural requirements that must be followed in order to permit the allowance of a class proof of claim, the instant case would provide the Court with an excellent opportunity to settle the conflict between the Circuits and to provide necessary procedural guidance to the courts below and to practitioners alike.

As matters now stand, three Courts of Appeals, the Sixth Circuit below and the Seventh and Eleventh Circuits, have held that class proofs of claim are now permissible in bankruptcy cases. One Court of Appeals, the Tenth Circuit, has taken a contrary position. Practitioners and the lower courts in the remaining circuits must somehow determine on their own, on a case by case basis, whether class proofs of claim will be authorized. This *ad hoc* adjudication will be difficult for courts, considering the conflict between the Circuit Courts that have considered the issue, and extremely risky for practitioners and individual creditors, in the absence of some indication by this Court that such class proofs of claim are or are not permissible. The risks involved are amply demonstrated by the severe treatment meted out to the individual employees in the instant case, whose valid claims have been summarily disallowed by the courts below without any examination of their substantive merit.

Bankruptcy cases have in recent years become increasingly large and complex, often including individual creditors numbering in the thousands. With the increased use of high-risk corporate refinancing and restructuring during the past decade, the bankruptcy courts can expect to see many more enormous cases such as the White Motor bankruptcy involved here. In light of this trend, some method whereby the bankruptcy courts can adjudicate extremely large numbers of claims efficiently has become both necessary and inevitable. The class proof of claim is one method of streamlining the procedure. Even if efficiency in itself was not reason enough to sanction class proofs of claim, there are many other reasons why they have inevitably been allowed in bankruptcy cases. *See generally American Reserve,* 840 F.2d, at 489-492.

If the class proof of claim is to be used widely to advantage in bankruptcy cases, the Court should articulate the procedural requirements that must be met. The Court of Appeals below disallowed the class Proof of Claim in the instant case because, among other reasons, Reid did not seek the application of Bankruptcy Rule 7023 and class certification of the claims before the

proof of claim was filed and because Reid did not file a Bankruptcy Rule 2019 disclosure statement setting out the details of his representation of the individual creditors. As set out more completely in the discussion that follows, these requirements have been rejected by the other Courts of Appeals that have sanctioned the use of class proofs of claim. To require the certification of the class before the proof of claim can even be filed would remove the efficiency of the claims procedure as it presently exists. Under Section 502(a) of the Bankruptcy Code, 11 U.S.C. § 502(a), a proof of claim is deemed allowed unless objection is made. Conceivably, class certification need never be addressed at all unless an objection is made. *See Charter,* 876 F.2d, at 873-875. The second requirement, that the class representative file a Bankruptcy Rule 2019 disclosure statement, is impossible to meet where a true class proof of claim is contemplated. *American Reserve,* 840 F.2d, at 493. This being the case, class proofs of claim will always be disallowed, or risk being disallowed, unless this Court reverses the opinion of the Court of Appeals below.

In summary, the opinion of the Court of Appeals below, and its conflict with the decisions of the Courts of Appeals for the Seventh Circuit and Eleventh Circuit, has introduced so much uncertainty and risk into the newly sanctioned practice of filing class proofs of claim in bankruptcy cases, that this procedure, despite its many merits, will languish unused. If this Court agrees with the majority of the Courts of Appeals that the bankruptcy class claims procedure should be allowed, then it should issue a writ of certiorari to the Court of Appeals and review its opinion.

I. THE COURT OF APPEALS' DETERMINATION THAT REID'S MOTION IN THE BANKRUPTCY COURT TO APPLY BANKRUPTCY RULE 7023 TO THE REID PROOF OF CLAIM WAS NOT TIMELY IS ERRONEOUS, CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, AND IS OTHERWISE BASED UPON THE COURT OF APPEALS' MISAPPREHENSION OF THE APPLICABLE STANDARDS THAT SHOULD GUIDE THE BANKRUPTCY COURT'S DECISION WHETHER TO APPLY BANKRUPTCY RULE 7023.

The opinion of the Court of Appeals states that "Rule 9014 authorizes bankruptcy judges, within their discretion, to invoke Rule 7023, and thereby, Fed.R.Civ.P. 23, the class action rule, to 'any stage' in contested matters, including, class proofs of claim." (Appendix, p. A-18). However, the Court of Appeals inexplicably went on to hold that the Bankruptcy Court below properly exercised its discretion not to apply Bankruptcy Rule 7023 to the Proof of Claim because Reid's motion to apply Bankruptcy Rule 7023 in the Bankruptcy Court below was untimely. (Appendix, p. A-21).

The Court of Appeals' analysis is erroneous, in the first place, because it disregarded and contradicted the unambiguous language of Bankruptcy Rule 9014 (Emphasis added):

> Rule 9014.
>
> CONTESTED MATTERS
>
> In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the

> following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. **The court may *at any stage in a particular matter* direct that one or more of the other rules in Part VII shall apply.** An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

In light of the language in the Bankruptcy Rule that the Court may apply Part VII Bankruptcy Rules "at any stage in a particular matter," it was a clear abuse of discretion for the Bankruptcy Court to find Reid's motion to apply Bankruptcy Rule 7023 in the instant case untimely.

The Court of Appeals' opinion gives no guidance as to when such a motion must be filed other than to say that it was late in the instant case. The Bankruptcy Court, however, stated that it exercised its discretion not to apply Bankruptcy Rule 7023 to the class Proof of Claim because "Reid failed to timely [sic] request authorization **prior to filing the class proof of claim."** (Appendix, pp. A-43-A-44) (Emphasis added). This reasoning, apparently endorsed by the Court of Appeals below, violates the plain language of Bankruptcy Rule 9014 that a motion to apply the class action Bankruptcy Rule can only be made after a contested matter is established by the filing of an objection to a proof of claim, and stands in direct conflict to the better reasoned position adopted by the Eleventh Circuit Court of Appeals.

The Eleventh Circuit held in the *Charter* case that a motion to apply Bankruptcy Rules 9014 and 7023 to a class claim can be filed by the class claimant **only after there has been an objection to the proof of claim:**

> The procedures governing the incorporation of Rule 23 into bankruptcy proceedings are contained in the Bankruptcy Rules. Rule 23 may be invoked in two circumstances: in an adversary proceeding and in a contested matter. Pursuant to the terms of Bankruptcy Rule 7023, Rule 23 applies in any adversary proceeding. Also, under Bankruptcy Rule 9014, the bankruptcy judge may at his discretion apply Bankruptcy Rule 7023, and by extension Rule 23, in a contested matter. . . .
>
> The filing of a proof of claim and the debtor's objection thereto do not constitute an adversary proceeding, and therefore this avenue for invoking Rule 23 was not available to the appellants. However, when an objection is made to a filed proof of claim, a contested matter arises. . . . Therefore, absent an adversary proceeding, **the first opportunity a claimant has to move under Bankruptcy Rule 9014, to request application of Bankruptcy Rule 7023, occurs when an objection is made to a proof of claim. Prior to that time, invocation of Rule 23 procedures would not be ripe, because there is neither an adversary proceeding nor a contested matter.**
>
> Here, the appellants complied with the above-described procedures. Their claim was filed within the bar date. Once filed, it was "deemed allowed," until objected to. 11 U.S.C. § 502(a). No objection was made to the claim for almost two years; once objection was made, the appellants promptly moved under Bankruptcy Rule 9014 to invoke Bankruptcy Rule 7023. **The Bankruptcy Rules impose no time requirement with respect to filing a motion for application of Bankruptcy Rule 7023;** indeed, the Code contains no other instance where a claimant must perfect a claim prior to objection. Thus, we conclude that there was no undue delay here.

Charter, 876 F.2d, at 873-875 (citations omitted) (emphasis added).

In two more recent decisions, district courts in both the Second and Third Circuit have adopted the broad view announced by the Eleventh Circuit in *Charter,* and have held that the class claimant may file a class proof of claim first and then seek the application of Bankruptcy Rule 7023, incorporating FED.R.CIV.P. 23, to certify the class of claimants at some later stage of the proceedings. *See, e.g., In re Zenith Laboratories, Inc.,* 104 Bankr. 659, 664 (D.D.N.J. 1989); *In re Chateaugay Corp.,* 104 Bankr. 626, 634 (D.S.D.N.Y. 1989). The holding of the courts below, that Reid was required to seek the application of Bankruptcy Rule 7023 before he filed the Proof of Claim contradicts the unambiguous provisions of Bankruptcy Rule 9014 and is so inconsistent with the better reasoned line of authority developing in the other circuits that the Court should issue a Writ of Certiorari to resolve the conflict on this crucial procedural point.

The Court of Appeals below attempted in vain to distinguish the situation in the instant case from the Eleventh Circuit Court of Appeals' decision in the *Charter* case, in which a motion to apply Bankruptcy Rule 7023 was filed after the claims bar date and after the trustee had objected to the class proof of claim, but before the bankruptcy court had determined the trustee's objection. In the *Charter* case, the Eleventh Circuit held that the motion to apply Bankruptcy Rule 7023 to the class proof of claim was not untimely. *In re Charter Co.,* 876 F.2d 866, 874-875 (11th Cir. 1989). The Eleventh Circuit gave no indication in its opinion, moreover, that a motion to apply Bankruptcy Rule 7023 to the class claim would not be timely still at some later time.

In any event, whether or not Reid filed a "timely" motion to apply Bankruptcy Rule 7023 is was not properly an issue before the Court of Appeals or any of the courts below. The fact of the matter is that the Trustee himself raised the issue in the Bankruptcy Court in his motion for summary judgment. The Trustee asserted that the Bankruptcy Court could not apply Bankruptcy Rule 7023 and certify the class unless Reid himself filed a Motion to apply Bankruptcy Rule 7023. Just as was done by the bankruptcy court in the *Charter* case, the Bankruptcy Court below

considered the issue of whether to apply Bankruptcy Rule 7023 to the Reid proof of claim, albeit on the Trustee's initiative, at the time it granted summary judgment in favor of the Trustee and disallowed the Reid proof of claim. Nothing in Bankruptcy Rule 9014 requires the Court to apply Bankruptcy Rule 7023 to a contested matter only upon the request of the party that filed the proof of claim. The Bankruptcy Court clearly was required to consider the issue once it had been raised by the Trustee. Because the issue was before the Bankruptcy Court at the time it granted summary judgment in favor of the Trustee, the instant case is exactly the same, for all practical purposes, as *Charter*. Accordingly, the Court of Appeals' efforts to distinguish *Charter* are unavailing.

The Court of Appeals also erred in holding that the Bankruptcy Court did not abuse its discretion in declining to apply Bankruptcy Rule 7023 to the class proof of claim. (Appendix p. A-21). Yet it is clear that the Bankruptcy Court's discretion was guided by improper considerations. First, the Bankruptcy Court held that class proofs of claim are generally disfavored in bankruptcy cases. The Court of Appeals below disagreed. (Appendix, p. A-20). The second and only other reason the Bankruptcy Court declined to apply Bankruptcy Rule 7023 is because Reid had not filed a motion to apply Bankruptcy Rule 7023 before the Proof of Claim was filed. As shown above, this reason too was incorrect.

The Bankruptcy Court's discretion should have been guided by the criteria set out in FED.R.CIV.P. 23 for the certification of a class. *Chateaugay,* 104 Bankr., at 634. Because the Bankruptcy Court failed even to address these criteria, the Court of Appeals erred in affirming the Bankruptcy Court's exercise of discretion. *Alexander v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers,* 565 F.2d 1364, 1372 (6th Cir. 1977); *Gore v. Turner,* 563 F.2d 159, 165-166 (5th Cir. 1978); *Schlater v. Kelley,* 40 Bankr. 594 (Bankr.E.D.Mich. 1984).

In summary, this case provides the Court with an opportunity to determine when a person filing a class proof of claim in a

bankruptcy case must seek the bankruptcy court's authority to apply Bankruptcy Rule 7023 (which incorporates FED.R.CIV.P. 23) to the case, and certify the class of claimants. To resolve the conflict on this point between the Sixth Circuit Court of Appeals below and the courts in the Eleventh, Second, and Third Circuits, the Court should issue a Writ of Certiorari to review the decision of the Court of Appeals in the instant case.

II. THE COURT OF APPEALS' DETERMINATION THAT THE BANKRUPTCY COURT PROPERLY EXERCISED ITS DISCRETION TO DISALLOW THE REID PROOF OF CLAIM ON THE GROUNDS THAT REID FAILED TO COMPLY WITH THE DISCLOSURE REQUIREMENTS OF BANKRUPTCY RULE 2019 IS BOTH ERRONEOUS AND IN DIRECT CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEALS FOR THE SEVENTH AND ELEVENTH CIRCUITS.

The Court of Appeals held that the Bankruptcy Court below did not abuse its discretion in disallowing the Reid Proof of Claim because Reid did not strictly comply with the disclosure requirements set out in Bankruptcy Rule 2019(a). (Appendix, p. A-22).

In contrast, the Seventh Circuit, in *American Reserve,* implicitly recognized that literal compliance with the provisions of Bankruptcy Rule 2019 is **not possible** in the case of a person who files a true class proof of claim. *American Reserve,* 840 F.2d, at 493. Bankruptcy Rule 2019 ordinarily requires an attorney who seeks to represent more than one creditor in a bankruptcy case to identify specifically the creditors whom he represents as well as the circumstances of his representation. However, in the context of a true Rule 23 class action, the class representative cannot comply with these requirements since the identities of the class members are sometimes unknown. Therefore, the class representative will, by his very nature, have no actual authority to represent the unnamed class members, at least not until the class is certified by the court. When the class is actually certified, the

authority to represent unnamed class members comes from the court — not from the unnamed class members. For this reason, the Seventh Circuit has held that the eventual certification by the class by the bankruptcy court fulfills all of the substantive requirements of Bankruptcy Rule 2019, and no separate Rule 2019 statement need be filed. *Id.*

Similarly, the Eleventh Circuit held that the bankruptcy court's certification of the class was all that was necessary to comply with the substantive requirements of Bankruptcy Rule 2019:

> As in *GAC* [*Matter of GAC Corp.*, 681 F.2d 1295 (11th Cir. 1982)], the claimants here did not file a verified disclosure statement pursuant to Bankruptcy Rule 2019(a). The rule requires every entity or committee representing more than one creditor to file a statement disclosing information relating to the nature of the representation. However, Bankruptcy Rule 2019 is satisfied, and the policies behind it are realized, by the certification of a class. *In the Matter of American Reserve Corp.*, 840 F.2d 487, 493 (7th Cir. 1988).

In re Charter Co., 876 F.2d 866, 875 (11th Cir. 1989) (footnote 14).

Just as in the instant case, the class representative in the *Charter* case did not file a Bankruptcy Rule 2019 statement. In that case, the claimant's motion to apply Bankruptcy Rule 7023 and certify the claimant class merely recited that the class in that case (claimants alleging securities laws violations by the debtor) had previously been certified by the district court in pre-bankruptcy securities litigation. The Reid proof of claim in the instant case is no less specific.

The purpose of the disclosure requirements is to ***shield*** innocent creditors from undetected conflicts of interest on the part of the attorney that represents more than one creditor in a

particular bankruptcy case.[2] In light of this legislative purpose, it is ironic that the Bankruptcy Court below utilized Rule 2019 as a ***sword*** to destroy the claims of the very creditors that Bankruptcy Rule 2019 was designed to protect, apparently disregarding the specific remedies provided by Bankruptcy Rule 2019(b)). Rule 2019(b) contemplates discontinuing the representation of creditors in a bankruptcy case if the representation is found to present a conflict of interest. Rule 2019(b) does not contemplate disallowing or destroying the claims of the very creditors that Bankruptcy Rule 2019 was designed to protect. The Court of Appeals has simply misread the purposes of Bankruptcy Rule 2019. Accordingly, this Court should issue a Writ of Certiorari to review the Court of Appeals' opinion and judgment.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT REID WAS NOT AUTHORIZED TO FILE A PROOF OF CLAIM ON BEHALF OF THE DEBTOR'S FORMER EMPLOYEES.

The Court of Appeals majority further erred in holding that the Reid Proof of Claim was properly disallowed because Reid had not presented sufficient proof to the Bankruptcy Court below that he was **actually** authorized to file the proof of claim by and on behalf of the individual class claimants. (Appendix, p. A-42). The Court of Appeals' decision in this regard is contrary to the requirements of Bankruptcy Rule 3001(b). The Trustee produced no evidence to establish that Reid lacked authority to file the Proof of Claim on behalf of the individual employees. "Bankruptcy Rule 3001(b) does not require an attorney acting as agent for a group of creditors to produce proof of agency until evidence controverting the agency has been presented." *In re Great West-*

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[2] Rule 10-211 [the predecessor to Bankruptcy Rule 2019], derived from §§ 209-213 of the [former Bankruptcy] Act is a comprehensive regulation of representation in a Chapter X case. . . . ***The legislative intention was that these powers should be employed wherever necessary to [protect] the rights of the individual investor.***

6 Collier on Bankruptcy (14th Ed.) ¶ 9.28, p. 1730 (citing House Hearings on H.R. 6439, 75th Cong., 1st Sess. (1937), pp. 163-164).

ern Cities, Inc. of New Mexico, 107 Bankr. 116, 120 (D.N.D.Tex. 1989).

Even if the Trustee had produced such evidence, the Bankruptcy Court's grant of summary judgment in favor of the Trustee was nevertheless erroneous because Reid's submitted an affidavit establishing the circumstances of his authority. The courts below overlooked the fact that the members of the class certified in the Michigan state court action had actually "opted in" to the state court class action as required by the Order of the Michigan state Court of Appeals. The employees could reasonably have believed that their affirmative response of "opting in" to the state court class action constituted authorization to Reid, as the attorney for the class, to undertake whatever steps were necessary to preserve their respective claims, including even the filing of a bankruptcy proof of claim. All of these factual issues were raised by Reid in the Bankruptcy Court in his Affidavit in Support of Motions. Accordingly, the Bankruptcy Court abused its discretion in disallowing the Reid proof of claim without at least resolving these factual issues, and it was improper for the Court of Appeals to affirm the Bankruptcy Court's abuse of discretion. *Id.,* at 121.

However, even if the Court of Appeals majority was correct in its determination that Reid was not expressly authorized in fact by the Debtor's former employees to file a proof of claim in the bankruptcy case on their behalf, the Court of Appeals majority erred in holding that such actual express authorization was required in the first place to file the proof of claim on behalf of the class members. As indicated by the Seventh Circuit in the *American Reserve* case, Bankruptcy Rule 7023 authorizes the filing of a **true** class proof of claim **without first obtaining actual authorization to file such a claim from the represented class members:**

> [Bankruptcy] Rule 7023 . . . expressly makes class actions available in adversary proceedings. A class action under Rule 23 is more than permissive joinder — the "spurious class action" under the version of Rule 23 in force between 1938 and 1966. ***A Rule 23 class action is not simply a device***

> ***by which one plaintiff prosecutes the case after many have filed separate suits (or intervened in a pending suit); it is a device by which the representative is an agent for persons who have not appeared or given even tacit consent.*** . . . . If § 501 prevents the class representative from prosecuting the claim on behalf of anyone who failed to file a proof-of-claim form (the equivalent of intervening in the pending bankruptcy case), then there will never be a *Rule 23* class action; there will only be a "spurious class action"; yet Bankruptcy Rule 7023 says that there are to be Rule 23 class actions in bankruptcy.

American Reserve, 840 F.2d, at 493. (citations omitted, emphasis added).

Even if the Court of Appeals is correct in its determination that Reid's express authority to represent the former employees in the Michigan state court class action did not extend to filing a proof of claim on their behalf in the bankruptcy case, then Reid's proof of claim placed him in exactly the same position as the class claimants in both the *American Reserve* case and the *Charter* case, in which the class proofs of claim were allowed. If the Court of Appeals is correct, then Reid's proof of claim constitutes an attempt to commence a brand new class action in the Bankruptcy Court below, and, under the Seventh Circuit's reasoning in *American Reserve,* neither Bankruptcy Rule 7023 nor FED.R.CIV.P. 23 required Reid to obtain actual authority from the purported class members before attempting to commence a class action on their behalf.

Finally, the Court of Appeals' determination that Reid could not file a class proof of claim because he was not a member of the class should also be reconsidered and rejected because Reid's authorization to represent the class representative, Burch, who was in turn authorized by the Michigan state court (and who could likewise have been appointed by the Bankruptcy Court below) to represent the employee class, is all that was needed to file the proof of claim.

To the extent that the Proof of Claim obscured Reid's representation of the named class member or appeared to suggest that Reid himself was the actual claimant, the Bankruptcy Court below should have allowed Reid to amend the proof of claim to reflect this fact, particularly since allowing the amendment would have resulted in no prejudice or inconvenience whatever to the Trustee or to the bankruptcy estate. The Bankruptcy Court's refusal to allow Reid to amend his proof of claim elevated form over substance, and utterly ignored the long series of precedents which liberally allow amendments to proofs of claim. *See, e.g., In re Meade Tool & Die Co.*, 164 F.2d 228 (6th Cir. 1947); *In re Butterworth*, 50 Bankr. 320 (D.W.D.Mich. 1984); *In re Supreme Appliance & Heating Co*, 100 F.Supp. 200 (W.D.Ky. 1951); *In re Midwest Telcproductions Co., Inc.*, 69 Bankr. 675 (Bankr.N.D.Ohio 1987); *In re Key*, 64 Bankr. 786 (Bankr.M.D.Tenn. 1986). The Bankruptcy Court's refusal to allow the amendment consequently constitutes an abuse of discretion.

The Bankruptcy Court's exercise of "discretion" caused approximately 260 former employees of the Debtor to forfeit severance claims amounting to over $3 million. The dissenting opinion of Court of Appeals member, Judge Wellford, properly recognizes that the only proper and equitable procedure would have been for the Bankruptcy Court to allow Reid to amend his proof of claim to comply with any procedural requirements that were not met by Reid.

On February 12, 1981, the examiner appointed in the White Motor case issued his report examining the effect of the Chapter 11 filing on the many former employees of White Motor. Among the findings made by the examiner can be found the following statement which accurately describes the position of the Debtor's former employees represented by Reid:

> Amid the vast number of complex legal and business issues of this case, and the hundreds of millions of dollars at stake, there exists a human element which cannot be over-

> looked. That specific human element is the plight of the employees of WMC [White Motor] who became victims.
>
> Many of WMC's former employees have served faithfully for over thirty (30) years. They range from fifty (50) to almost seventy (70) years of age. They have little prospect, if any, of finding new employment. Many took early retirement — some on their own initiative but most at the suggestion of WMC. Most relied upon their accumulated severance pay to carry them through to the time they became eligible for retirement benefits. (Examiner's Report, p. 1).

Belittling the seriousness of the claims to the hundreds of employees at stake here, the Trustee challenged the Reid Proof of Claim only on the basis of procedural irregularities which could easily have been cured if Reid had been given the usual opportunity to amend the Proof of Claim. The courts below have treated this case as a mere procedural exercise without taking into consideration at all the nature of the claims involved. None of the Courts below addressed the merits of the claims. Instead, the employees' claims were disallowed on the basis of technicalities and through the exercise of "discretion." The employees represented by Reid were terminated by the Debtor. Their earned severence pay will never be paid unless this Court reverses the decision of the Court of Appeals below.

With all due respect to the courts below, equity has not been applied here. As suggested by the dissent of Judge Wellford in the Court of Appeals below (Appendix, p. A-24), the Bankruptcy Court should have exercised its discretion to allow Reid simply to amend the Proof of Claim.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 9, 1990

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

PATRICK T. REID,
Petitioner

-vs-

WHITE MOTOR CORPORATION and JOHN T. GRIGSBY, JR.,
Disposition Assets Trustee of White Motor Corporation,
Respondents.

APPENDIX

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No. 87-4066

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICK T. REID,
Plaintiff-Appellant,

v.

WHITE MOTOR CORPORATION, ET AL.,
Defendants-Appellees

ORDER

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges; and JOINER*, Senior U.S. District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
(s) Leonard Green, *Clerk*

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* Hon. Charles W. Joiner sitting by designation from the Eastern District of Michigan

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-4066

PATRICK T. REID,
Plaintiff-Appellant,

v.

WHITE MOTOR CORPORATION; JOHN T. GRIGSBY, JR., Disposition Assets Trustee for White Motor Corporation,
Defendants-Appellees.

JUDGMENT

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges; and JOINER, Senior U.S. District Judge.

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed as modified.

IT IS FURTHER ORDERED that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized

below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
(s) Leonard Green, *Clerk*

Issued as Mandate: November 22, 1989

COSTS: None

Filing fee .....$
Printing.....$
Total .....$

A True Copy.

Attest:

(s) Gary McCarthy
Deputy Clerk

Opinion of the United States Court of Appeals

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 87-4066

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICK T. REID,
Plaintiff-Appellant,

v.

WHITE MOTOR CORPORATION; JOHN T. GRIGSBY, JR., Disposition Assets Trustee for White Motor Corporation,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed September 28, 1989

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges, and JOINER, Senior District Judge*

KRUPANSKY, Circuit Judge, delivered the opinion of the court in which JOINER, Senior District Judge, joined. WELLFORD, Circuit Judge, (p. 22) delivered a separate opinion concurring in part and dissenting in part.

KRUPANSKY, Circuit Judge. Plaintiff-appellant, Patrick T. Reid (Reid), has appealed from the district court's grant of summary judgment in favor of defendant-appellee, John Grigsby,

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* Hon. Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Jr., Trustee for White Motor Corporation (Trustee).[1] Reid initiated this action by filing a class proof of claim on behalf of former employees of White Motor Corporation (WMC) in bankruptcy proceedings which had been commenced by WMC. The record disclosed the following facts.

On August 16, 1971, WMC sold its Diamond Reo Truck Division to Diamond Reo Trucks, Inc. (Diamond Reo). All employees of WMC's Diamond Reo Truck Division were retained by Diamond Reo following the sale. Subsequently, on February 21, 1977, Reid, a Michigan attorney, filed an action on behalf of his client, Jerry A. Burch (Burch), seeking class certification in the Michigan Circuit Court for the County of Ingham against WMC on behalf of former WMC salaried employees in which Burch and the putative class members sought severance pay arising out of WMC's sale of Diamond Reo Truck Division to Diamond Reo. *Burch v. White Motor Corp.*, Case No. 77-19932 CK (Mich. Circuit Ct., Ingham County 1977). On August 5, 1977, the Michigan circuit court certified the case as a class action (hereinafter referred to as the *Burch* class).

On September 4, 1980, WMC filed a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio. As a result of the bankruptcy proceedings, the automatic stay provisions of Bankruptcy Code Section 362 enjoined all pending legal actions against WMC including the *Burch* lawsuit which was eventually dismissed by the Michigan circuit court on July 12, 1983 for failure to prosecute.

On September 3, 1981, Reid, as the purported agent of the *Burch* class, filed a general unsecured proof of claim (claim no.

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[1] Pursuant to the modified plan of reorganization confirmed by the bankruptcy court on November 18, 1983, the Trustee, John T. Grigsby, Jr., was appointed the successor in interest to White Motor Corp. for the purpose of objecting to claims filed in the bankruptcy proceedings.

188) in WMC's bankruptcy proceeding asserting entitlement to severance pay in the amount of $1,743,233, which was subsequently amended to $3,097,791. Apart from his unilateral assertion of fiduciary status, Reid provided no confirmation of his agency or authority to act on behalf of the members of the *Burch* class in the WMC bankruptcy proceeding. Appended as "Attachment A" but not incorporated by reference into the proof of claim filed by Reid was a list of unidentified names, juxtaposed by dollar amounts. The named individuals were not identified as former employees of the Diamond Reo Truck Division of WMC or as members of the *Burch* class. Additionally, Reid failed to petition the bankruptcy court, pursuant to bankruptcy rule 9014, to invoke bankruptcy rule 7023, which mandated the procedure to be implemented in processing class proofs of claim in all bankruptcy proceedings. Individual proofs of claim were never filed by the individuals named in Appendix A of Reid's filed proof of claim.

After the bar date of August 30, 1983, fixed by the bankruptcy court for filing proofs of claim, the Trustee, on September 30, 1983, filed an objection to Reid's proof of claim and thereafter, on November 6, 1984, filed a motion for summary judgment. In his motion for summary judgment, the Trustee asserted that:

1. A class proof of claim is inconsistent with the bankruptcy rule 3002 mandating the filing of individual proofs of claim;

2. Fed.R.Civ.P. 23 is not automatically invoked and may be implemented only by authority of the bankruptcy court upon a petitioner's duly filed motion;

3. Fed.R.Civ.P. 23 could not be applied to Reid's pending claim as a matter of law because (a) he was not a member of the class or duly authorized representative; (b) he failed to satisfy the procedural requirements of Bankruptcy Rules 9014 and 7023; and (c) the class claim

was not adjudged superior to the claim process provided by the Bankruptcy Rules; and

4. The absent class members were barred from filing individual claims over one year after the claims bar date had passed.

Reid opposed the motion for summary judgment and argued that because the class had already been certified in the Michigan circuit court, the Trustee was collaterally estopped from contesting the class certification in the bankruptcy court. Additionally, Reid submitted an affidavit attesting that he was the attorney appointed by the Michigan circuit court to represent the purported class of former employees of WMC's Diamond Reo Truck Division.

On June 20, 1985, the bankruptcy court granted summary judgment in favor of the Trustee. The bankruptcy court decided that (1) class proofs of claim cannot be used to circumvent the requirement of Bankruptcy Rule 3003 mandating the filing of individual proofs of claim; (2) class proofs of claim are disfavored in bankruptcy; (3) Reid did not comply nor did he attempt to comply with proper procedures to certify the class in this bankruptcy proceeding mandated by Bankruptcy Rule 9014; (4) Reid was not a creditor, and thus, could not maintain the proof of claim which he filed in his own right; (5) Reid had failed to prove that he was authorized to act on behalf of the putative class; and (6) Reid had failed to show cause why the bar deadline for filing proofs of claim should be extended to permit the filing of individual proofs of claim.

Although the bankruptcy court filed its memorandum opinion on June 20, 1985, it failed to file a separate entry of judgment as required by Bankruptcy Rule 9021, the counterpart to Fed.R.Civ.P. 58. To date, no separate entry of judgment complying with Bankruptcy Rule 9021 has been filed in the bankruptcy court.

On July 22, 1985, thirty-two days after the bankruptcy court granted summary judgment, Reid filed the following three motions: (1) a motion for reconsideration; (2) a motion, pursuant to Rule 9014, to apply Rule 7023 to the contested proceeding; and (3) a motion to consider claim no. 188, the claim Reid filed, as properly filed by individuals of the *Burch* class, and/or an amendment of the filed claim or motion to permit the filing of late individual proofs of claim. The bankruptcy court, on September 11, 1985, denied Reid's motion for reconsideration because it "merely reiterate[d] the arguments previously presented in opposition to the motion for summary judgment and fails to substantiate the relief sought." The bankruptcy court further concluded that neither the application of Bankruptcy Rule 7023, nor an amendment of the claim, would be effective because Reid's proof of claim had been disallowed. Finally, the bankruptcy court noted that Reid had presented no viable reason to extend the bar date in order to permit the members of the *Burch* class to file individual proofs of claim.

On September 20, 1985, Reid appealed the bankruptcy court's June 20, 1985 order of summary judgment and the September 11, 1985 order denying his three post-judgment motions. On June 30, 1986, the district court affirmed the bankruptcy court's decision in all respects. *In Re White Motor Company,* 65 Bankr. 383 (N.D. Ohio 1986). The district court dismissed Reid's appeal from the June 20, 1985 order granting summary judgment as untimely filed. The district court also determined that the bankruptcy court did not abuse its discretion in denying Reid's remaining post-judgment motions. However, the district court's June 30, 1986 memorandum and its separate entry of judgment were erroneously recorded by the clerk of courts on the docket of Case No. C82-3209,[2] another matter

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[2] Case No. C82-3209 was an adversary proceeding which also arose in the WMC bankruptcy. The matter was entitled *Hanse et al. v. White Farm Equipment Co. et al.*

involving WMC, rather than to the correct docket of Case No. C85-3318. As a result of the error, Reid never received actual notice of the filing of the district court's memorandum and separate entry of judgment.

On October 3, 1987, sixteen months after the entry of the June 30, 1986 order, Reid contacted the district court to determine the status of his appeal. It was at this time the district court discovered the clerical errors on the docket entries. As a result, on October 30, 1987, the district court entered a *nunc pro tunc* order on the docket of Case No. C85-3318 declaring June 30, 1986 as the effective date of its memorandum and separate entry of judgment. Reid thereafter filed this appeal, on November 25, 1987, within thirty days of the entry of the district court's *nunc pro tunc* October 30, 1987 order.

Initially, this court is confronted with jurisdictional challenges resulting from both the bankruptcy and district courts' judgments. First, the Trustee has charged that Reid's appeal to this court was untimely, because Reid had failed to commence his appeal from the district court's final order of June 30, 1986 within the thirty-day time frame mandated by Federal Rules of Appellate Procedure 4(a)(1).[3] The Trustee urged that Reid's appeal was filed on November 25, 1987, sixteen months after the June 30, 1986 order. Consequently, the Trustee in his appellate brief and in pre-argument motions has asserted that this court lacked jurisdiction to entertain Reid's instant appeal.

An appeal must be commenced "from a district court to the court of appeals. . . within thirty days after the date of entry of the

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[3] Fed.R.App.P. 4(a)(1) provides in pertinent part:

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . .

judgment or order apealed from." Fed.R.App.P. 4(a)(1); *see also Peake v. First National Bank and Trust Co.*, 717 F.2d 1016, 1018 (6th Cir. 1983); *Equal Employment Opportunity Comm'n v. K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982). The thirty day time period commences when the district court complies with Fed.R.Civ.P. 58 and 79(a). Fed.R.App.P. 4(a)(6).[4] Rule 58 provides that "[e]very judgment shall be set forth on a separate document. A judgment is effective *only* when set forth and when entered as provided in Rule 79(a)." Fed.R.Civ.P. 58 (emphasis added). Rule 79(a),[5] in turn, mandates that all orders shall be entered by the clerk of courts on the civil docket book corresponding to the case number assigned to such lawsuit.

Addressing the standards imposed by Rules 58 and 79(a), this court's attention is directed to the pronouncements of the Supreme Court in *United States v. Indrelunas*, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed.2d 202 (1973)(per curiam), wherein it stated that Rules 58 and 79(a), which mandate a separate entry of judgment to be recorded in the lawsuit's corresponding civil docket, must be "mechanically" applied to avoid uncertainty as to when a judgment becomes effective for appellate review.

> The reason for the "separate document" provision is clear from the notes of the advisory committee of the 1963 amendment [of Rule 58]. Prior to 1963, there was consider-

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[4] Fed.R.App.P. 4(a)(6) provides:

> (6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

[5] Fed.R.Civ.P. 79(a) provides in pertinent part:

> All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made.

> able uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document.

Id. at 220, 93 S.Ct. at 1564 (citations omitted). The thirty day time period in which to commence an appeal does not accrue until the district court has filed an entry of judgment set forth on a separate document in the civil docket. The Court explicitly rejected the notion of "case-by-case tailoring of the 'separate document' provision." *Id.* at 221, 93 S.Ct. at 1565. *See also Cloyd v. Richardson,* 510 F.2d 485 (6th Cir. 1975) (per curiam) (strict compliance with the requirements of Rule 58 and 79(a) is mandatory); *In re Kilgus (Reichman v. United States Fire Insurance Co.),* 811 F.2d 1112, 1117 (7th Cir. 1987) ("The more mechanical the application of a jurisdictional rule, the better.").

The Trustee, however, argued that the Supreme Court's decision in *Bankers Trust Co. v. Mallis,* 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam), compels this court to conclude that Reid has waived compliance with the separate document rule. The Trustee has misinterpreted *Mallis.* In *Mallis,* the district court had, in violation of Rule 58, failed to set forth on a separate document an entry of judgment. The appellant, however, had filed an appeal from the district court's memorandum within thirty days on the assumption that there had been compliance with Rule 58 and 79(a) by the district court. The Supreme Court concluded that it and the court of appeals had jurisdiction despite the technical defect of the separate document requirement. The Supreme Court stated:

> In *United States v. Indrelunas,* we recognized that the separate-document rule must be "mechanically applied" in determining whether an appeal is timely. Technical applica-

> tion of the separate-judgment requirement is necessary in that context to avoid the uncertainties that once plagued the determination of when an appeal must be brought. The need for certainty as to the timeliness of an appeal, however, should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered. As Professor Moore notes, if the only obstacle to appellate review is the failure of the District Court to set forth its judgment on a separate document, "there would appear to be no point in obliging the appellant to undergo the formality of obtaining a formal judgment. *[I]t must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . . . The rule should be interpreted to prevent loss of the right to appeal, not to facilitate loss.*"

Mallis, 435 U.S. at 386, 98 S. Ct. at 1120-1121 (citations and footnote omitted) (emphasis added).

The Supreme Court anchored its decision on three factors. First, the "District Court clearly evidenced its intent that the opinion . . . represent[ed] the final decision in the case." *Id.* at 387, 98 S.Ct. at 1121. Second, the judgment of dismissal was properly recorded on the clerk's docket. And, finally, the appellee from the district court had not objected to perfecting the appeal from that order. *Id.* at 387, 98 S.Ct. at 1121. Accordingly, the Supreme Court fashioned a narrow modification of the *Indrelunas* doctrine. Where the failure of the district court to comply with the separate document principle of Rules 58 and 79(a) did not jeopardize the appellant's appeal, the Court concluded that the error could be considered waived. However, the Court reaffirmed the doctrine that under the circumstances where the failure to comply with the separate document rule has created confusion which sabotages appellate jurisdiction, the separate document requirement should continue to be mechanically applied. *Id.* at 387, 98 S.Ct. at 1121. *See also Parisie v. Greer*, 705 F.2d 882, 891

(7th Cir.) (en banc) (Eschbach, J.) ("*Mallis* reaffirmed the holding in *Indrelunas* that 'the separate document rule must be "mechanically applied" *in determining whether an appeal is timely.*' ") (quoting *Mallis*, 435 U.S. at 386, 98 S.Ct. at 1120) (emphasis in original), *cert. denied*, 464 U.S. 950 (1983); *In re Seiscom Delta, Inc. (Seiscom Delta, Inc. v. Two Westlake Park)*, 857 F.2d 279, 282 (5th Cir. 1988) ("[T]he Court [*in Mallis*], drew a careful distinction between (i) the court of appeals' *jurisdiction* to entertain an appeal where the parties obviously waived the separate-document requirement by considering the judgment final, and (ii) cutting off a party's right to appeal where the party has not waived the separate-document requirement.") (emphasis in original); *In re Ozark Restaurant Equipment Co., Inc.*, 761 F.2d 481 (8th Cir. 1985) (same); *Amoco Oil Co. v. Jim Heiling Oil & Gas, Inc.*, 479 U.S. 966, 107 S.Ct. 468, 93 L.Ed.2d 413 (1986) (Blackmun, J., dissenting from denial of certiorari) ("[T]he separate-document requirement must be applied mechanically in order to *protect* a party's right of appeal, although parties may waive this requirement in order to maintain appellate jurisdiction.") (emphasis in original); *accord Beukema's Petroleum Co. v. Admiral Petroleum Co.*, 613 F.2d 626 (6th Cir. 1979).

Applying the Supreme Court's mandate in *Indrelunas* and *Mallis* to the case at bar, the district court's June 30, 1986 order could not operate as the final order from which an appeal was required to be taken. In contrast to *Mallis*, the clerk of the district court in the instant case entered the district court's June 30, 1986 memorandum and entry of judgment on the wrong docket, recording the judgment on the civil docket of Case No. C82-3209 rather than the correct docket of Case No. C85-3318. Reid never received notice from the district court of the June 30, 1986 order. Upon the detection of the error by Reid, the district court on October 30, 1987 corrected the mistake by logging the memorandum order and separate entry of judgment in the correct docket and, accordingly, fulfilled the requirements of Rules 58 and 79(a)

at that time. *Indrelunas* and *Mallis* dictate that Rules 58 and 79(a) should be applied to protect the right of an appeal. As unequivocally stated by the Court in *Mallis*, "[Rules 58 and 79(a)] should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Mallis*, 435 U.S. at 386, 98 S.Ct. at 1121. Consequently, Reid's thirty-day period in which to perfect an appeal to this court commenced to accrue on October 30, 1987, the date the district court finally complied with Rules 58 and 79(a).

The Trustee's argument that since the district court's October 30, 1987 order was designated as *nunc pro tunc*, the effective date for accruing the appellate period was June 30, 1986 and not October 30, 1987, is misplaced. The teachings of *Indrelunas* and *Mallis* preclude a district court from impeding an appellant's right to an appeal by resorting to *nunc pro tunc* entries. *See, e.g., In re D'Arcy*, 142 F.2d 313 (3d Cir. 1944). In *D'Arcy*, the district court, on June 18, 1943, entered a memorandum dismissing the plaintiff's action; however, the district court failed to issue a separate entry of judgment. On February 10, 1944, the district court, upon learning of its mistake, entered the missing entry of judgment on the docket. The district court attempted to date the effect of the February 10, 1944 order back to June 18, 1943, and thereby abrogate plaintiff's appeal. The court held that the district court's attempt to date its entry of judgment back to the original filing date of the memorandum was improper. *Id.* at 315. The court stated that:

> since under Civil Procedure Rule 58 [the district court's order] could not be effective prior to its entry, it is clear that the attempt of the court to date the order back to the time of the filing of its opinion was wholly ineffective to deprive the appellant of its right to appeal.

In re D'Arcy, 142 F.2d at 315.

In the case at bar, the district court improperly attempted to retroactively date its final judgment entry of October 30, 1987 to June 30, 1986 thereby depriving Reid of his appeal. The thirty-day period to appeal commenced to accrue on October 30, 1987, the date the district court corrected its error by properly docketing the entry of judgment. Accordingly, since Reid commenced the instant appeal on November 25, 1987, which was within the thirty-day period, his appeal to this court was timely filed.

In the event that this court should consider the instant appeal to this court as timely, the Trustee has urged, in the alternative, that the district court's decision, which dismissed Reid's appeal from the bankruptcy court as untimely, should be affirmed. The bankruptcy court on June 20, 1985 entered an opinion dismissing Reid's class proof of claim; however, the bankruptcy court failed to file a separate entry of judgment pursuant to Bankruptcy Rule 9021.[6] As a result of the bankruptcy court's oversight, Reid failed to commence an appeal to the district court within 10 days of the bankruptcy court's June 20, 1985 order as required by Bankruptcy Rule 8002. The appeal was not perfected until September 20, 1985. Reid's appeal was subsequently dismissed by the district court as untimely. Neither party was aware of the bankruptcy court's failure to journalize its June 30, 1985 order; at least the issue was not argued on the appeal from the bankruptcy court to the district court. On appeal to this court, Reid, citing *Indrelunas*, argued for the first time that the district court had erred in dismissing his appeal since his appeal time had not commenced to accrue because of the bankruptcy court's failure to file a separate entry of judgment.

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[6] Bankruptcy Rule 9021 provides:

Except as otherwise provided herein, Rule 58 F.R.Civ.P. applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F.R.Civ.P. to Rule 79(a) F.R.Civ.P. shall be read as a reference to Rule 5003 of these Rules.

Reid's argument is well taken. Bankruptcy Rule 9021 requires that a judgment becomes effective to activate the accrual of appeal time only when a separate entry of judgment is recorded in the docket pursuant to Bankruptcy Rule 5003. A bankruptcy court is required to set forth on a separate document every judgment which is entered in an adversary proceeding or contested matter, and the court's clerk is to enter that separate document of the bankruptcy case. *In re Ozark Restaurant Equipment Co., Inc.*, 761 F.2d 481 (8th Cir. 1985); *Stepflug v. Federal Land Bank*, 790 F.2d 47 (7th Cir. 1986). The separate document rule of Bankruptcy Rule 9021 is identical to that of Fed.R.Civ.P. 58. *In re Seiscom Delta, Inc. (Seiscom Delta, Inc. v. Two Westlake Park)*, 857 F.2d 279, 285 (5th Cir. 1988); *In re Kilgus (Reichman v. United States Fire Insurance Co.)*, 811 F.2d 1112, 1117 (7th Cir. 1987) (Bankruptcy Rule 9021 is applied in the same manner as Rule 58). *See generally* 9 L. King, *Collier on Bankruptcy*, ¶9021.03-.04 at 9021-3 (15th ed. 1987). In the case at bar, since a separate document entering judgment had never been filed by the bankruptcy court even to date, it is patently clear that Rule 9021 was not initially satisfied. Consequently, the district court erred in dismissing Reid's appeal as untimely.

Although the bankruptcy court had failed to comply with Rule 9021, the oversight does not divest this court of its jurisdiction to entertain Reid's instant appeal. The pronouncements of *Mallis* recognize that prevailing circumstances in a given case could result in the waiver of the Rule 58 mandate. "If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose." *Mallis*, 435 U.S. at 385, 98 S.Ct. at 1120 (footnote omitted); see also *Allah v. Superior Ct. of California*, 871 F.2d 887, 890 n.1 (9th Cir. 1989) (Court of Appeals mechanically applied Rule 58 to save appeal but wavied formalistic remand

because parties had failed to object to absence of separate judgment.); *Parisie,* 705 F.2d at 890 (Eschbach, J.) (A court confronted with a technically premature appeal because a separate entry of judgment had not been filed may consider the appeal without the necessity of a formalistic remand.); *accord Falls Stamping & Welding v. International Union, UAW,* 744 F.2d 521, 526 (6th Cir. 1984). Since Reid and the Trustee proceeded through the district court as if the separate document requirement had been satisfied by the bankruptcy court, the failure to have complied with Rule 9021 was waived thereby eliminating any need for a formalistic remand of this action to the bankruptcy court for entry of a separate document of entry of judgment. To conclude otherwise would result in an undue delay in a case which has already been in litigation for approximately nine years.[7]

In his September 20, 1985 appeal to the district court from the bankruptcy court's June 20, 1985 order granting summary judgment in favor of the Trustee and September 9, 1985 order denying his motion for reconsideration, Reid joined as issues in that appellate proceeding the propriety of the class proof of claim. Reid, on appellate review, has again argued that his class proof of claim had been improperly denied. Reid has urged that, although class actions are generally disfavored in bankruptcy proceedings, they are permitted by the bankruptcy code within the discretion of the bankruptcy judge. Reid's analysis is partially correct.

Although there is a conflict between the reported decisions considering the permissibility of a class proof of claim in bankruptcy proceedings, *see, e.g., In re Great Western Cities, Inc. of New Mexico,* 88 Bankr. 109, 112 (Bankr. N.D. Tex. 1988) (and cases cited therein), the more equitable resolution was recently

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[7] Because the record in this case is complete and this court's only function is to determine and apply the correct legal standards to the propriety of Reid's filing a class proof of claim, there is no need for a remand to the district court to consider the merits of Reid's appeal. *See Michigan Road Builders Ass'n, Inc. v. Milliken,* 834 F.2d 583, 590 n.6 (6th Cir. 1987), *aff'd,* 109 S.Ct. 1333 (1989).

enunciated by the Seventh Circuit in *In re American Reserve,* 840 F.2d 487 (7th Cir. 1988) which endorsed the filing of a class proof of claim. *See also In re The Charter Co. (Certified Class in the Charter Securities Litigation v. The Charter Co.),* 876 F.2d 866 (11th Cir. 1989); Wolfson, *Class Actions In Bankruptcy: A Clash Of Policies Reconciled,* 5 Bankruptcy Dev. J. 391 (1988) (advocating that the various policies underlying class actions and bankruptcy proceedings sanction the filing of a class proof of claim).

In *American Reserve,* the claimants were insurance policyholders of the debtor. The claimants filed a proof of claim in the debtor's bankruptcy proceedings for themselves and all other defrauded policyholders who had purchased insurance policies from the debtor between 1977 and 1979. The court in *American Reserve* noted that Bankruptcy Rule 7023 expressly provided that "Rule 23 Fed.R.Civ.P. applies in adversary proceedings." The court further explained that Bankruptcy Rule 9014, which applies to contested matters in bankruptcy proceedings, permits the bankruptcy court "at any stage in a particular matter [to apply] one or more of the other rules of Part VII," which would include Rule 7023, as it relates to class actions.[8] *American Reserve,* 840 F.2d at 488; *see also* Bankruptcy Rule 9014.[9] Accordingly, Rule

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[8] The instant class proof of claim is a "contested matter," rather than an "adversary proceeding." "[T]he filing of an objection to a proof of claim. . . creates a dispute which is a contested matter." Advisory Committee Note to Fed.R.Bankr.P. 9014. After a class proof of claim is filed, 11 U.S.C. 502(a) deems the claim allowed unless objected to by a party in interest. That objection creates a contested matter for which the bankruptcy court is permitted, but not obligated, to direct that Fed.R.Bankr.P. 7023 apply. An adversary proceeding may only be initiated by complaint pursuant to Bankruptcy Rule 7003. Such proceedings are formal and the Federal Rules of Civil Procedure in their entirety, including the class action rules, apply to such proceedings. *See also* Bankruptcy Rule 7001.

[9] Bankruptcy Rule 9014 provides:

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and

9014 authorizes bankruptcy judges, within their discretion, to invoke Rule 7023, and thereby Fed.R.Civ.P. 23, the class action rule, to "any stage" in contested matters, including, class proofs of claim.

Nor does the bankruptcy code preclude the application of the class action rules in a contested matter during a bankruptcy proceeding. Contrary to the Trustee's assertion and the bankruptcy court's conclusion, section 501 is not an exclusive list of situations where a person can file a proof of claim on behalf of a creditor. Section 501 authorizes the filing of a proof of claim by an agent in three situations: (1) by an indenture trustee on behalf of a bondholder; (2) a bankrupt's co-debtor or guarantor on behalf of a creditor; and (3) the debtor on behalf of a creditor. 11 U.S.C. § 501.[10] However, neither the 1978 Bankruptcy Code nor its legislative history suggests that the criteria of section 501 is exclusive. *American Reserve,* 840 F.2d at 492-493; *In re Retire-*

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opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. Any entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rule of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

[10] 11 U.S.C. 501 provides in pertinent part:

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

ment Builders, Inc., 96 Bankr. 390, 392 (Bankr. S.D. Fla. 1988) ("Section 501 is not meant to be an exclusive list and . . . class action filings can be considered."). "Only a 'clear expression of congressional intent' terminates the ability to file representative actions under rule 23." *American Reserve*, 840 F.2d at 490 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (1979)).

Moreover, an interpretation that section 501 is an exclusive list of persons who are capable of filing a proof of claim on behalf of a creditor would eviscerate the meaning of two bankruptcy rules. First, Bankruptcy Rule 7023 which explicitly permits the utilization of a class action in an adversary proceeding in the bankruptcy court would be superfluous. *See American Reserve*, 840 F.2d at 493.

> If § 501 prevents the class representative from prosecuting the claim on behalf of anyone who failed to file a proof-of-claim form. . ., then there will never be a Rule 23 class action; there will only be a "spurious class action"; [sic] yet Bankruptcy Rule 7023 says that there are to be Rule 23 class actions in bankruptcy.

Id., at 493. In addition, bankruptcy rule 3001(b)[11] which permits the filing of a proof of claim by an "authorized" agent, would also be meaningless if section 501 was strictly construed. *Id.*, at 493. Accordingly, considering the bankruptcy code and rules *in pari materia* clearly evinces the permissibility for filing a class proof of claim. Rule 9014 delegates wide discretion to the bankruptcy judge in considering certification of class proofs of claim pursuant to Rule 7023 in a contested matter.

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[11] Bankruptcy Rule 3001(b) provides, in pertinent part:

A proof of claim shall be executed by the creditor of the creditor's authorized agent. . .

In the case at bar, the bankruptcy court did not abuse its discretion in denying Reid's proof of claim on behalf of the former employees of WMC. Reid totally disregarded compliance with the bankruptcy procedures regulating the filing of class proofs of claim in a bankruptcy proceeding.

Reid failed to confirm his representative capacity to represent a class; he failed to identify the class he purportedly represented; and he failed to timely petition the bankruptcy court to apply the provisions of Rules 9014 and 7023. *In re GAC Corp. (Novack v. Callahan)*, 681 F.2d 1295, 1299 (11th Cir. 1982) ("[Claimant] never filed a Rule 914 motion requesting that Rule 723 apply, and the bankruptcy court in its direction chose not to so direct. Thus, Rule 723 . . . was never made applicable to the proceedings involved here, and in the absence of such application a class proof of claim could not properly be permitted.").[12] In sum, Reid ignored every mandatory requirement essential to filing a class proof of claim with the bankruptcy court.[13]

Moreover, Reid had no authorization designating him as a representative of the putative class. Under Fed.R.Civ.P. 23, the class representative must be a member of the class he claims to represent. Fed.R.Civ.P. 23; *General Telephone Co. v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982). "A class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Davis v. Ball Memorial Hosp. Ass'n, Inc.*, 753 F.2d 1410, 1420

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[12] Bankruptcy Rules 914 and 723 are equivalent to the current Bankruptcy Rules 9014 and 7023, respectively.

[13] Reid's reliance on the Eleventh Circuit's recent decision of *In re The Charter Co.*, 876 F.2d at 873-76 for the proposition that he had timely filed a motion pursuant to Rule 9014 is misplaced. In *In re The Charter Co.*, the appellants had filed a motion pursuant to Rule 9014 to invoke Rule 7023 immediately after the trustee objected to their class proof of claim. In contrast, Reid filed a motion pursuant to Rule 9014, on July 22, 1985, after the bankruptcy court had granted the Trustee's motion for summary judgment dismissing Reid's purported class proof of claim.

(7th Cir. 1985) (quoting *East Texas Motor Freight System, Inc. v. Rodriquez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977)). "Stated another way, the plaintiff must have standing to represent the class." *In re W.T. Grant Co.,* 24 Bankr. 421, 425 (Bankr. S.D.N.Y. 1982). The individuals seeking class certification have the burden of proving that they are entitled to class certification. *Senter v. General Motors Corp.,* 532 F.2d 511 (6th Cir.), *cert. denied,* 429 U.S. 870 (1976). In the case at bar, Reid was not a member of the class of former employees of WMC's Diamond Reo Truck Division. Reid was merely an attorney who had offered his services to the putative class in order to prosecute their entitlement to severance pay against WMC. As such, Reid lacked standing to initiate this class action.

Reid, however, has argued that he was the authorized agent of the putative class and had filed the class proof of claim in accordance with Bankruptcy Rule 3001(b). Pursuant to Bankruptcy Rule 2019, a purported agent must file a verified statement with the clerk of the bankruptcy court. The statement must include a copy of the instrument, if any, whereby the agent is empowered to act on behalf of the creditors he is representing. *In re Electronics Theatre Restaurants Corp.,* 57 Bankr. 147 (Bankr. N.D. Ohio 1986) (Rule 2019 requires that every person purporting to represent more than one creditor in a bankruptcy proceeding file a verified statement setting forth the names and addresses of the creditors, the nature and amount of the claims and the relevant facts and circumstances surrounding the employment of the agent.). Failure to comply with Rule 2019 is cause for denial of the proof of claim. *In re Baldwin United Corp.,* 52 Bankr. 146, 148 (Bankr. S.D. Ohio 1985). Reid, who was an attorney representing the class and not a member of the class, has never filed a verified statement, pursuant to Rule 2019, with the clerk of the bankruptcy court delineating his authority to act as an agent for any purported class. His unilateral assertion of fiduciary status in his proof of claim was insufficient to satisfy the formal requirements of Rule 2019.

Moreover, Reid's argument that since he was authorized to represent the *Burch* class in the Michigan circuit court, he was subsequently authorized as an agent for the purported class in the instant action is less than persuasive. It is well-settled that consent to being a member or the representative of a class "in one piece of litigation is not tantamount to a blanket consent to any litigation the class counsel may wish to pursue." *In re Standard Metals Corp.*, 817 F.2d 625, 631 (10th Cir. 1987), *modified on other grounds*, 839 F.2d 1383 (1988); *In re Manville Forest Products Corp.*, 89 Bankr. 358, 376-77 (Bankr. S.D.N.Y. 1988); *In re Baldwin United Corp.*, 52 Bankr. 146, 149 (Bankr. S.D. Ohio 1985); *cf. In re Ross*, 37 Bankr. 656, 658 (Bankr. 9th Cir. BAP 1984). Accordingly, the bankruptcy court was well within its discretion to dismiss Reid's class proof of claim since he has failed to elucidate his authority as agent for the WMC former employees.[14]

In conclusion, although the bankruptcy rules permit the filing of a class proof of claim, Reid blatantly failed to comply with the bankruptcy procedure to commence a class action. As a result, the bankruptcy court did not abuse its discretion in denying Reid's class proof of claim. This court has considered Reid's remaining assignments of error and considers them to be without merit. Accordingly, the judgment of the district court is hereby AFFIRMED as MODIFIED.

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[14] Nor did the bankruptcy court abuse its discretion by not extending the bar date to allow the supposed class members to file individual proofs of claim. "The decision not to extend the bar date deadline is within the sound discretion of the [bankruptcy] judge." *Vancouver Women's Health Soc. v. A.H. Robins Co.*, 820 F.2d 1359, 1363 (4th Cir. 1987). *See also In the Matter of GAC Corp.*, 681 F.2d 1295, 1299 (11th Cir. 1982) (Bankruptcy judge did not abuse discretion in not extending bar date when the purported class members had relied on their class proof of claim instead of filing individual proof of claims.). Accordingly, the bankruptcy court acted within in its sound discretion by precluding the extension of the bar date.

WELLFORD, Circuit Judge, concurring in part and dissenting in part:

This is a difficult case procedurally, and the result reached works a hardship on the class represented by Mr. Reid. I am in complete agreement with the analysis reached that would preclude the district court from impeding a right to appeal through means of *nunc pro tunc* orders. (I am also in agreement that Reid's appeal was, under the circumstances, timely and that we have jurisdiction to entertain this appeal.)

I concur in the conclusion also that bankruptcy rules permit the filing of a proof of claim by an "authorized agent." I dissent concerning the exercise of discretion by the bankruptcy court in denying Reid's proof of claim on behalf of others who were former employees of White Motor Corporation. He should, in my view, have granted Reid the right to file, or to amend, the proof of claim in order to permit these employees to proceed as a class action. It is true that Reid himself was not a member of the class he purported to represent, but the real question is whether he properly could be considered an authorized agent. I harbor the conviction that the bankruptcy court (and the district court) were guilty of a clear error in judgment in reaching the conclusion to deny the claim (or claims) based on Reid's agency status and in refusing to permit an amendment.

In that important respect, then, I depart from the opinion of my brothers and respectfully DISSENT.

REFERENCE DATA

Case Name: Reid v. White Motor Corporation

Case Number: 87-4066

Argued: February 10, 1989

Case Below: Northern Ohio D.C. No. C85-3318 (Batchelder, D.J.)

Counsel for plaintiff-appellant: Patrick R. Hogan, Lansing, MI.

Counsel for defendants-appellees: David C. Weiner, Hahn, Loeser & Parks, Cleveland, OH.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WHITE MOTOR CORPORATION *Debtor*	Civil Action No. C82-3209 C 85-3318 **MEMORANDUM AND ORDER**

ALDRICH, J.

Patrick T. Reid appeals from an order entered by the bankruptcy court on June 20, 1985 granting summary judgment in favor of the Disposition Assets Trustee ("the DAT") for White Motor Corporation ("WMC") on a claim filed by Reid on behalf of a class of former WMC employees. Reid also appeals from an order entered by the bankruptcy court on September 11, 1985, denying three post-judgment motions. Pending before the Court is the DAT's motion to dismiss for lack of jurisdiction and motion to dismiss for failure to demonstrate abuse of discretion. For the reasons set forth below, the DAT's motions are granted and the appeals are dismissed.

The District Court's appellate jurisdiction rests on 28 U.S.C. §158,[1] as enacted by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

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[1] Title 28 U.S.C. §158 provides in pertinent part:

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

* * *

(c) An appeal under subsection[ ] (a) . . . of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

I.

The facts which are pertinent to ruling on the DAT's motion are succinctly and adequately set forth in the bankruptcy court's June 20, 1985 order. *In re White Motor Corp.*, No. B80-3361 (Bankr. N.D. Ohio June 20, 1985) ("June 20 order"). The parties have not objected to the bankruptcy court's findings of fact, which in their entirety state:

> 1. On September 4, 1980, WMC filed a voluntary petition under Chapter 11 of the Bankruptcy Code. (11 U.S.C. §1101 et. seq.) On November 18, 1983, a modified plan of reorganization was confirmed. Under the plan the DAT, John T. Grigsby, Jr., is successor in interest to WMC for the purpose of objecting to claims.
>
> 2. On September 3, 1981 claim No. 188 was filed for $1,743,233.05 and subsequently amended to $3,097,791.99.
>
> 3. Patrick T. Reid, an attorney, filed claim No. 188 as agent for a class of former WMC employees. The claim which asserts rights to severance pay arises from a class action filed against WMC on February 21, 1977 in Michigan State Court. In the case of Burch v. WMC, Case No. 77-19932-CK, Reid filed a class action alleging the same liability as asserted herein. That action certified by the State Court was eventually dismissed.
>
> 4. Reid is not a member of the class for which he filed the claim.
>
> 5. Appended to claim No. 188 is a list of names and amounts, the significance of which is unexplained. Presumably the list consists of members of the class on whose behalf the claim was filed. It is unclear, however, whether those

listed are actual or potential members of the State Court class action.

6. August 30, 1983 was the bar date for filing claims in the WMC case.

7. On September 20, 1983, the DAT filed objection to claim No. 188 asserting it was the subject of a contested lawsuit and should be expunged. On November 6, 1984, the DAT filed the motion for summary judgment [on his objection to claim No. 188].

In support of his motion for summary judgment filed pursuant to Bankruptcy Rule 7056[2], the DAT argued that (1) Reid's class claim could not be used to circumvent the requirement of Bankruptcy Rule 3003(c)(2)[3] that individual proofs of claim be filed; (2) Reid had not moved, pursuant to Bankruptcy Rule

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[2] Bankruptcy Rule 7056 provides that "Rule 56 F. R. Civ. P. applies in adversary proceedings."

[3] Bankruptcy Rule 3003(c)(2) provides:

> Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

9014,[4] for application of Bankruptcy Rule 7023,[5] which governs the procedure for filing a class proof of claim; (3) even if Bankruptcy Rule 7023 was applicable, Reid had not satisfied that rule's procedural requirements since he was not a member of the class, he had not sought certification as soon as practicable after filing the claim, a class action would not better protect individual interests, and because a class action was not necessary to accommodate the claims of individual class members; and (4) the claims bar date prevented class members from filing late individual claims, even though the class action was timely filed.

Reid argued in opposition that the class had already been certified in the Michigan state court action and that the DAT was therefore estopped from contesting the class certification in bankruptcy court. Reid also contended that the DAT had not been prejudiced by the delay in seeking class certification and that recertification was unnecessary, inappropriate and inefficient. In an apparent effort to create a genuine issue of material fact, Reid

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[4] Bankruptcy Rule 9014 provides:

> In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

[5] Bankruptcy Rule 7023 provides that "Rule 23 F. R. Civ. P. applies in adversary proceedings." Rule 23, of course, states the procedural requirements for bringing a class action.

submitted an affidavit stating that he was the attorney appointed by the Michigan state court to represent former employees of WMC in a certified class action.

On June 20, 1985, the bankruptcy court entered its order granting the DAT's motion for summary judgment. In a concise opinion, the court held that:

> No section of the Code authorizes filing a class claim. A proof of claim must be "executed by the creditor or the creditor's authorized agent. . . ." Bankruptcy Rule 3001(b). Bankruptcy Rule 7023 which governs class actions is applicable to contested claims only on court order under Bankruptcy Rule 9014. Class actions, therefore, are not directly available as a procedural mechanism for filing claims. While Rule 9014 authorizes the court to apply Rule 7023, as a general rule courts deem class actions inappropriate to claim proceedings.
>
> Because the courts generally disfavor these actions and Reid failed to timely request authorization prior to filing the class claim, this Court declines to order Bankruptcy Rule 7023 applicable to the Reid claim.
>
> The certification of the class action in the State Court is not binding on this Court and is not determinative of the propriety of a class proceeding on claims. Moreover, since Reid is not a WMC creditor and the claim cannot be maintained on behalf of the class, there exists no genuine issue of material fact regarding the impropriety of the claim. Further, Reid does not assert that he was authorized by individual creditors to file claims on their behalf. Summary judgment on the DAT's objection to claim is, therefore, appropriate.
>
> The parties dispute whether individual class members should be permitted to file late claims for the liability asserted in the class claim. As a rule a class action cannot be

maintained to circumvent the requirement of filing individual claims. Individual class members who failed to file claims are now barred by the Court's order of August 1, 1983. Extending the bar date for cause is within the sound discretion of the court. There is no basis, however, for extension of the bar date in this case. Adequate notice was given and Reid has failed to establish grounds for such extension. Moreover, Reid has failed to distinguish which individuals are to be included within the scope of the requested extension. Extension of the bar date is, therefore, denied. It is worthy of note that the Court cannot deal dispositively with potential motions to allow the filing of late claims.

IT IS, THEREFORE, ORDERED that DAT's motion for summary judgment on the objection to claim No. 188 is granted.

June 20 order, slip op. at 2-4 (citations omitted).

B.

Reid did not preserve his right to appeal by filing a notice of appeal within the ten-day period allowed under Bankruptcy Rule 8002.[6] Instead, on July 22, 1985, thiry-two days after his claim had been disallowed, Reid filed a flurry of motions. First, in his motion for reconsideration, Reid argued that the bankruptcy court had erred in granting summary judgment. In short, Reid therein reiterated the arguments he previously made concerning the propriety of class certification. Second, Reid belatedly moved under Bankruptcy Rule 9014 to apply, *inter alia*, Bankruptcy Rule 7023. Finally, Reid filed a tripartite motion requesting that (1) putative class members be permitted to amend the proof of

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[6] Bankruptcy Rule 8002 provides in relevant part:

(a) The notice of appeal shall be filed with the clerk of the bankruptcy court within 10 days of the date of the entry of the judgment, order, or decree appealed from.

If a timely notice of appeal is not filed, no appeal may be taken later. Advisory Committee Note to Bankruptcy Rule 8002.

laim; (2) the court consider his claim as the claim of each putative class member, as if filed individually; and (3) the claims bar date be extended to permit putative class members an opportunity to file tardy proofs of claim.

The bankruptcy court denied Reid's motion for reconsideration because it "merely reiterates the arguments previously presented in opposition to the motion for summary judgment and fails to substantiate the relief sought." *In re White Motor Corp.*, No. B80-3361, slip op. at 2 (Bankr. N.D. Ohio Sept. 11, 1985) ("Sept. 11 order"). The court further held that neither the application of Bankruptcy Rule 7023, nor an amendment of the claim would be effective because Reid's claim had been disallowed. Finding that, "[a]s previously stated, class action claims cannot be maintained to circumvent the requirement of filing individual claims," *id.* at 2, the court denied Reid's motion to consider his claim properly filed by putative class members. Finally, since "the Court previously held that cause was not established to justify extension of the claims bar date," and Reid had "again failed to substantiate cause for extending the bar date," *id.* at 2-3, the court denied Reid's motion to extend the claims bar date to permit the filing of tardy individual claims.

On September 19, 1985, Reid filed a notice of appeal, ninety-one days after the bankruptcy court had disallowed his claim. Pending before this Court are the DAT's motion to dismiss Reid's appeal for lack of jurisdiction and his motion to dismiss for failure to demonstrate abuse of discretion.

Upon examination of the briefs and record, this Court determines that "the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Bankruptcy Rule 8012.

II.

A.

The DAT contends that Reid's post-judgment motions did not toll the running of his appeal time. Reid's failure to file a timely notice of appeal in the DAT's view therefore deprives this Court of jurisdiction over Reid's appeal from the bankruptcy court's June 20 order. With respect to Reid's post-judgment motions, the DAT argues that they should all be treated as motions made pursuant to Fed. R. Civ. P. 60(b),[7] since "[e]very one of the issues raised in and by these motions had been raised by the Trustee in its Motion for Summary Judgment and decided in favor of the Trustee by the Bankruptcy Court in its June 20 Order." Motion to Dismiss at 5. The DAT goes on to claim that the denial of Reid's post-judgment motions must be reviewed under an abuse of discretion standard. He therefore concludes that:

> Since those motions were not predicated on any of the grounds set forth under Rule 60(b), the Bankruptcy Court's actions could not have been an abuse of discretion and this Court should dismiss Reid's appeal of the Order. Reid must not be permitted to circumvent the time limitations for the filing of an appeal and obtain a review of the underlying

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[7] Bankruptcy Rule 9024 makes Fed. R. Civ. P. 60(b) applicable to cases under the Bankruptcy Code. Fed. R. Civ. P. 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

June 20 judgment through an appeal of the denial of his motions for reconsideration.

In response, Reid contends first that the June 20 order was not final and therefore not appealable, citing *Coopers & Lybrand v. Livesay*, 437 U.S. 461, 464 (1978), for the proposition that an order denying class certification is not final. Reid further argues that because the bankruptcy court could have vacated the June 20 order, that order could not have been final. He concludes that only when the various post-judgment motions had been denied did the time for appeal begin to run.

In the alternative, Reid argues that the June 20 order was not final because it granted only partial summary judgment. The order, he insists, did not finally determine the rights of individual claimants. Upon this rather precarious foundation he concludes that the right to appeal arose when the second order was entered, since the bankruptcy court therein finally determined the claims of individual claimants.

Noting that Bankruptcy Rule 3008 governing reconsideration of claims carries no time limit, Reid next argues that his motions for reconsideration were timely filed. Relying on his assertion that the June 20 order was not final, he then asserts that the requirements of Rule 60(b) do not apply to his post-judgment motions because Rule 60(b) applies only to final judgments and orders. Even conceding the finality of the June 20 order and thus the applicability of Rule 60(b), Reid argues that the denial of his post-judgment motions is reviewable because "relief is available under Rule [3008] after the time to appeal from a particular order of the Bankruptcy Judge has expired." Brief in Opposition at 13 (quoting *In re W.F. Hurley, Inc.*, 612 F.2d 392 (8th Cir. 1980)).

Reid then contends alternatively that his motions met the requirements of Rule 60(b). Reid points out that the bankruptcy court's finding that he was not authorized by individual creditors

of WMC to file their claims constitutes a mistake of fact within the parameters of Rule 60(b)(1). Reid reaches this conclusion based on the Michigan state court's decision to certify a class of individual claimants. Reid insists that this mistake of fact represented a genuine issue of material fact which should have precluded the bankruptcy court from disposing of his claim on summary judgment. Moreover, Reid argues that the June 20 order should have been set aside under Rule 60(b)(6). He does not, however, explain why Rule 60(b)(6) applies.

III.

A. *The June 20 Order*

Reid's appeal teeters atop his argument that the June 20 order was not final and thus not appealable. It is well-settled that a final decision is one which terminates the litigation on the merits. *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978); *Catlin v. United States,* 324 U.S. 229 (1945). It seems rather obvious and beyond contention, therefore, that an order which grants summary judgment and thereby completely terminates a case is a final order. 9 J. Moore, Moore's Federal Practice ¶110.07, at 108 n.6 (relegating this observation to a footnote). *Cf. In re Smith*, 735 F.2d 459 (11th Cir. 1984) (order denying summary judgment is interlocutory for purposes of appeal); *Leonard v. Socony-Vacuum Oil Co.*, 130 F.2d 535 (7th Cir. 1942), *cited in* 9 J. Moore, *supra*, at n.6 (partial summary judgment).

Reid's reliance on *Coopers & Lybrand* is entirely misplaced. The present case is easily distinguishable because here the bankruptcy court ended the litigation by granting summary judgment. Furthermore, Reid's argument that the June 20 order granted only partial summary judgment because it "did not finally determine the rights of the individual claimants," Brief in Opposition at 10, is utterly devoid of merit. Put in equivalent logical terms, Reid is contending that an action by A against B is not complete until the rights of C have been adjudicated. This logic so undermines the need for finality in litigation that it must be rejected. Nonparties whose claims are time-barred should, according to Reid, be able to avoid the applicable statute of limitations or, as here, the claims bar date, by reopening a prior final judgment in which their rights were implicated. In any event, by its own terms the June 20 order obviously did not grant only partial summary judgment.

Here, the bankruptcy court entered its order granting summary judgment on June 20, 1985. The time for Reid to file a

notice of appeal began to run on that date. *Jetero Const. Co., Inc. v. South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. 1976) (a decision is final for purposes of appeal and for purposes of post-judgment motions when judgment has been entered). Since Reid did not file his notice of appeal until September 19, 1985, this Court is without jurisdiction to entertain an appeal of the June 20 order. *In re LBL Sports Center, Inc.*, 684 F.2d 410 (6th Cir. 1982). *See also* Advisory Committee Note to Bankruptcy Rule 8002 cited *supra* note 6. With respect to the June 20 order, the DAT's motion to dismiss is granted.

B. *The Motion for Reconsideration*

Reid's motion for reconsideration simply renewed and reiterated the legal arguments which the bankruptcy court disposed of on summary judgment. Under Bankruptcy Rule 9024, motions for reconsideration are to be treated as Rule 60(b) motions. 1 Collier on Bankruptcy ¶3.03[8] (15th ed. 1979).

The fundamental basis for Reid's motion for reconsideration is legal error. As recognized by the Sixth Circuit, "a claim of legal error [is] subsumed in the category of mistake under Rule 60(b)(1). A 60(b)(1) motion based on legal error must be brought within the normal time for taking an appeal." *Pierce v. United Mine Workers of America Welfare and Retirement Fund for 1950 and 1974*, 770 F.2d 449, 451 (6th Cir. 1985). Likewise, a claim of legal error unaccompanied by extraordinary circumstances is not cognizable under Rule 60(b)(6). *Id.* For these reasons, this Court is without jurisdiction to hear Reid's appeal from the bankruptcy court's denial of his motion for reconsideration. *In re LBL Sports Center, Inc.*, 684 F.2d 410.

Reid's present appeal constitutes a not too subtle attempt to bootstrap an appeal of the underlying summary judgment decision onto the denial of his motion for reconsideration, not to mention his other post-judgment motions. As stated by the Sixth Circuit:

> It is settled that a 60(b) motion "cannot be used to avoid the consequences of a party's decision . . . to forego an appeal from an adverse ruling." This admonition applies with particular force to a motion based on legal error. The interests of finality of judgments and judicial economy outweigh the value of giving a party a second bite of the apple by allowing a 60(b) motion, after the appeal period has run, on the same legal theory that would have been asserted on appeal.

Pierce, 770 F.2d at 451-52 (citation omitted).

One must question why Reid moved the bankruptcy court to reconsider and reverse its June 20 order, when he now argues that that order was not final. The answer is of course that Reid knew (or should have known) that the summary judgment decision completely disposed of his claim. The only procedure by which he could obtain judicial review of the June 20 order was a motion under Bankruptcy Rule 9024. Reid's contention that the summary judgment decision was not a final order only highlights the contradiction in his argument. In the final analysis, Reid has been hoist by his own petard.[5]

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[5] [H]oist by his own petard means "destroyed by his own trickery or inventiveness." A *petard*, in medieval warfare, was an explosive charge which daring warriors would affix to the walls or gate of a castle under siege. This action in itself was a most hazardous one, but the greatest danger came after the *petard* was in place. The explosive was detonated by a slow match or slowly burning fuse. Occasionally, of course, the explosive went off prematurely, in which case the warrior was *hoist* (lifted or heaved) *by his own petard*. It is unlikely that this archaic phrase would have persisted in our language, even in a figurative sense, had not Shakespeare conferred immortality upon it with this line from Hamlet: " 'Tis the sport to have the engineer hoist with his own petard." Today it is chiefly used to describe a person ruined by plans or devices with which he had plotted to ensnare others.

W. Morris & M. Morris, Dictionary of Word and Phrase Origins 285-86 (1977).

C. The Other Post-Judgment Motions

Although the parties disputed whether individual class members should be permitted to file late claims, the bankruptcy court noted in its June 20 order that it could not "deal dispositively with potential motions to allow the filing of late claims." June 20 order at 3. The remaining post-judgment motions arguably raised new matters which were not previously before the bankruptcy court. To the extent, therefore, that Reid's companion motions to permit late filing of claims and to consider claims properly filed by individual claimants were not disposed of by the June 20 order, this Court has jurisdiction to review the September 11 order denying those motions. Similarly, Reid's motions to permit amendment of his claim and to apply various adversary rules were properly raised post-judgment and are reviewable by this Court.

Post-judgment motions made more than ten days after the entry of judgment are to be treated as Rule 60(b) motions. 12 Collier on Bankruptcy ¶307.04[4] (14th ed. 1978).[9] An order denying a motion under Rule 60(b) is final and appealable. 11 C. Wright & A. Miller §2871 (1973). In reviewing Rule 60(b) motions, this Court is to set aside the decision of the lower court only if it constitutes an abuse of discretion. *Bank of Montreal v. Olafsson*, 648 F.2d 1078 (6th Cir. 1981). As stated by the Sixth Circuit in *Stephens Industries, Inc. v. McClung*, No. 85-5694, slip op. at 5 (6th Cir. April 28, 1986) (quoting *In re Posner*, 700 F.2d 1243, 1246 (9th Cir.), *cert. denied*, 464 U.S. 848 (1983)), " 'a reviewing court may determine that the Bankruptcy Court abused its discretion only when there is a definite and firm conviction that

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[9] The procedure for bringing post-judgment motions is controlled by Fed. R. Civ. P. 59 and 60, made applicable to bankruptcy cases by Bankruptcy Rules 9023 and 9024. Rule 59 regulates motions for a new trial and to alter or amend judgment, and must be served within ten days of the entry of judgment. Rule 60 controls motions to reopen a case and to reconsider an order, but there is no similar time limit. Hence, post-judgment motions not falling within the parameters of Rule 59 are to be treated as Rule 60 motions. *See* Advisory Committee Notes to Bankruptcy Rules 9023 and 9024.

the court below committed a clear error of judgment in the conclusion it reached upon a weighing of all relevant factors.' "

Upon consideration, this Court holds that the bankruptcy court did not abuse its discretion in denying Reid's motions to permit late filing of claims and to consider claims properly filed by individual claimants. At no time has Reid shown cause for extending the claims bar date, and to have considered his claim properly filed by individual claimants would have accomplished that very result. Moreover, Reid did not articulate a basis for relief under any of the provisions of Rule 60(b).[10]

With respect to Reid's motions to permit amendment of his claim and to apply various adversary rules, the bankruptcy court in effect held that there was nothing pending before the court either which could be amended or to which those rules could be applied. This decision was not an abuse of discretion. The bankruptcy court could not very well allow amendment of Reid's claim or application of various procedural rules when there was no

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[10] Reid's only argument is that the bankruptcy court's determination that he was not authorized by individual creditors to file their claims constituted a mistake of fact cognizable under Rule 60(b)(1). This argument is meritless since it fails to address the issues raised by his motions to permit late filing of claims and to consider claims properly filed by individual claimants.

In fact, the argument relates to the underlying June 20 order and to his motion for reconsideration; specifically, it relates to the propriety of class certification. Even if this Court had jurisdiction to consider it, his Rule 60(b)(1) argument would not be convincing. The fact that Reid may have been authorized to file claims for putative class members was entirely immaterial to the bankruptcy court's decision not to certify a class. The court recognized that class actions are disfavored in bankruptcy cases and, in any event, Reid was not even a member of the class which he purported to represent as required by Fed. R. Civ. P. 23. Thus, even if the bankruptcy court made the supposed mistake of fact, such fact was not material to the issue of whether or not to certify the class. Therefore, summary judgment was not inappropriate.

Since, however, Reid failed to file a timely notice of appeal from the June 20 order, this Court has held in parts III A and B of this opinion that it lacks jurisdiction to entertain an appeal from the June 20 order and from the denial of Reid's motion for reconsideration.

case pending before the court. C. Wright & A. Miller, Federal Practice and Procedure §1484 (1972). Reid first had to succeed in vacating the June 20 decision in order to lend efficacy to these motions. Reid having failed to do so, the bankruptcy court correctly held that "[a]n order applying the adversary rules and permitting amendment of a disallowed claim would be inoperative." Sept. 11 order at 2.

IV.

For the reasons set forth above, the DAT's motion to dismiss for lack of jurisdiction is granted with respect to Reid's appeal from the June 20 order and the denial of his post-judgment motion for reconsideration. With respect to the remainder of Reid's post-judgment motions, the DAT's motion to dismiss for failure to demonstrate abuse of discretion is granted and the bankruptcy court's order disposing of those motions is affirmed.

IT IS SO ORDERED.

(s) ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Opinion of the Bankruptcy Court granting summary judgment against the Petitioner

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WHITE MOTOR CORPORATION *Debtor*	In Proceedings for a Reorganization Under Chapter 11 Case No. B 80-3361

ORDER

Before the Court is the motion of the Disposition Assets Trustee (DAT) for summary judgment on his objection to claim No. 188 filed by Patrick T. Reid. Claimant submitted a response and brief in opposition. The Reid class claim against the estate of White Motor Corporation (WMC) is in issue.

Upon consideration the Court finds:

1. On September 4, 1980, WMC filed a voluntary petition under Chapter 11 of the Bankruptcy Code. (11 U.S.C. §1101 et. seq.) On November 18, 1983, a modified plan of reorganization was confirmed. Under the plan the DAT, John T. Grigsby, Jr., is successor in interest to WMC for the purpose of objecting to claims.

2. On September 3, 1981 claim No. 188 was filed for $1,743,233.05 and subsequently amended to $3,097,791.99.

3. Patrick T. Reid, an attorney, filed claim No. 188 as agent for a class of former WMC employees. The claim which asserts rights to severance pay arises from a class action filed against WMC on February 21, 1977 in Michigan State Court. In the case of Burch v WMC, Case No. 77-19932-CK, Reid filed a class action alleging the same liability as asserted herein. That action certified by the State Court was eventually dismissed.

Opinion of the Bankruptcy Court granting summary judgment against the Petitioner

4. Reid is not a member of the class for which he filed the claim.

5. Appended to claim No. 188 is a list of names and amounts, the significance of which is unexplained. Presumably the list consists of members of the class on whose behalf the claim was filed. It is unclear, however, whether those listed are actual or potential members of the State Court class action.

6. August 30, 1983 was the bar date for filing claims in the WMC case.

7. On September 20, 1983, the DAT filed objection to claim No. 188 asserting it was the subject of a contested lawsuit and should be expunged. On November 6, 1984, the DAT filed the motion for summary judgment.

No section of the Code authorizes filing a class claim. A proof of claim must be "executed by the creditor or the creditor's authorized agent. . . ." Bankruptcy Rule 3001(b). Bankruptcy Rule 7023 which governs class actions is applicable to contested claims only on court order under Bankruptcy Rule 9014. Class actions, therefore, are not directly available as a procedural mechanism for filing claims. While Rule 9014 authorizes the court to apply Rule 7023, as a general rule courts deem class actions inappropriate to claim proceedings. *Novak v Callahan, (In re: G.A.C. Corp.), 681 F.2d 1295, (11th Cir., 1982); S.E.C. v Aberdeen Securities Co., Inc., 480 F.2d 1121, (3rd Cir., 1973); In re: Society of the Divine Savior, 15 Fed. R. Serv. 2d 294, (D.C.E.D. Wisc., 1971)* and *In re: Shulman Transport Enterprises, Inc., 21 B.R. 548, (Bankr., S.D.N.Y., 1982), aff'd., 33 B.R. 383, (D.C.S.D.N.Y., 1983)*, but see *In re: W. T. Grant Co., 24 B.R. 421, (Bankr., S.D.N.Y., 1982)*, and *In re: R.E.A. Express, Inc., 10 B.R. 812, (Bankr., S.D.N.Y., 1981)*.

Because the courts generally disfavor these actions and Reid failed to timely request authorization prior to filing the class

claim, this Court declines to order Bankruptcy Rule 7023 applicable to the Reid claim.

The certification of the class action in the State Court is not binding on this Court and is not determinative of the propriety of a class proceeding on claims. *Moore v Ross, (In re: Ross), 37 B.R. 656, (Bankr., 9th Cir., 1984.* Moreover, since Reid is not a WMC creditor and the claim cannot be maintained on behalf of the class, there exists no genuine issue of material fact regarding the impropriety of the claim. Further, Reid does not assert that he was authorized by individual creditors to file claims on their behalf. Summary judgment on the DAT's objection to claim is, therefore, appropriate.

The parties dispute whether individual class members should be permitted to file late claims for the liability asserted in the class claim. As a rule a class action cannot be maintained to circumvent the requirement of filing individual claims. *In re: Grocerland Cooperative, Inc., 32 B.R. 427, (Bankr., N.D. Ill., 1983) and In re: Woodmoor Corp., 4 B.R. 186, (Bankr., D. Colo., 1980).* Individual class members who failed to file claims are now barred by the Court's order of August 1, 1983. Extending the bar date for cause is within the sound discretion of the court. Bankruptcy Rule 3003(c)(3) and *G.A.C.*, supra. There is no basis, however, for extension of the bar date in this case. Adequate notice was given and Reid has failed to establish grounds for such extension. Moreover, Reid has failed to distinguish which individuals are to be included within the scope of the requested extension. Extension of the bar date is, therefore, denied. It is worthy of note that the Court cannot deal dispositively with potential motions to allow the filing of late claims.

Opinion of the Bankruptcy Court granting summary judgment against the Petitioner

IT IS, THEREFORE, ORDERED that DAT's motion for summary judgment on the objection to claim No. 188 is granted.

Dated this 20th day of June, 1985.

(s) William J. O'Neill
United States Bankruptcy Judge

cc: E. Michael Stafford
Laurence E. Oster
David C. Weiner
Patrick A. Heinann
Richard Gurbst
John C. Parks

Opinion of the Bankruptcy Court denying the Petitioner's post-trial motions

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	
WHITE MOTOR CORPORATION *Debtor*	Case No. B80-03361

ORDER DENYING MOTIONS OF PATRICK T. REID

This matter is before the Court on motions of Patrick T. Reid for (1) reconsideration of the order disallowing Claim No. 188; (2) for an order pursuant to Bankruptcy Rule 9014 to apply various adversary rules to Claim No. 188; and (3) for an order to consider claims properly filed by individual claimants, or to permit amendment or late filing of claims. The Disposition Assets Trustee (DAT) of White Motor Corporation filed responses thereto. By order of June 20, 1985, this Court previously granted the DAT's motion for summary judgment on objection to Claim No. 188.

On consideration the Court finds:

(1) Summary judgment on objection to Claim No. 188 was appropriately rendered as a matter of law for reasons stated in the June 20, 1985 order. Summary judgment was specifically applicable pursuant to B.R. 9014 which incorporates B.R. 7056. Movant's request for reconsideration merely reiterates arguments previously presented in opposition to the motion for summary judgment and fails to substantiate the relief sought.

(2) Movant requests application of Part VII of the Bankruptcy Rules to this contested matter including B.R. 7023 pertaining to class actions and B.R. 7015 regarding amendment of pleadings. Movant further seeks authority to amend Claim No. 188. As a result of this Court's order of summary judgment and

disposition of movant's request for reconsideration, Claim No. 188 has been disallowed. Moreover, the June 20, 1985 order specifically denied application of B.R. 7023. An order applying the adversary rules and permitting amendment of a disallowed claim would be inoperative and is, therefore, denied.

(3) Movant requests that Claim No. 188 be considered properly filed by individual claimants or that such claimants be permitted to file tardy claims. As previously stated, class action claims cannot be maintained to circumvent the requirement of filing individual claims. *In re Grocerland Cooperative, Inc.*, 32 B.R. 427 (Bankr. N.D. Ill. 1983) and *In re Woodmoor Corp.*, 4 B.R. 186 (Bankr. D. Colo. 1980). Therefore, Claim No. 188 cannot be considered properly filed by individual claimants. Furthermore, the Court previously held that cause was not established to justify extension of the claims bar date, adequate notice of this date having been given. Movant has again failed to substantiate cause for extending the bar date. As stated in movant's pleading, "in opting in, the individuals relied upon their claims against the debtor being presented for proper ajudication and therefore have relied upon their status as class members to obtain the relief to which they deem themselves entitled." Their claims were not properly presented for ajudication, but this fact cannot serve as a basis for extending the bar date.

IT IS, THEREFORE, ORDERED that the motions of Patrick T. Reid for (1) reconsideration of the order disallowing Claim No. 188; (2) for an order pursuant to Bankruptcy Rule 9014 applying Part VII of the Rules to this contested matter; and (3) for an order considering claims properly filed or alternatively permitting amendment or late filing of claims, are denied.

Dated this 11th day of September, 1985.

(s) William J. O'Neill
United States Bankruptcy Judge

11 U.S.C. § 502

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to

exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates; or

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of

the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(7) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered

and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

FED.R.CIV.P 23

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the

findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed,

and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Bankruptcy Rule 2019.

REPRESENTATION OF CREDITORS AND EQUITY SECURITY HOLDERS IN CHAPTER 9 MUNICIPALITY AND CHAPTER 11 REORGANIZATION CASES

(a) *Data Required.* In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed purusant to § 1102 of the Code, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement with the clerk setting forth

(1) the name and address of the creditor or equity security holder;

(2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition;

(3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and

(4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other dispostion thereof.

The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(b) *Failure to Comply; Effect.* On motion of any party in interest or on its own initiative, the court may

(1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any entity, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that entity, committee, or indenture trustee to be heard further or to intevene in the case;

(2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any entity or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and

(3) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by an entity or committee who has not complied with this rule or with § 1125(b) of the Code.

Bankruptcy Rule 3001.

PROOF OF CLAIM

(a) Form and Content. A proof of claim is a written statement setting forth a creditor's claim. A proof of claim for wages, salary, or commissions shall conform substantially to Official Form No. 20 or No. 21; any other proof of claim shall conform substantially to Official Form No. 19.

(b) Who May Execute. A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.

(c) Claim Based on a Writing. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(d) Evidence of Perfection of Security Interest. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.

(e) Transferred Claim.

(1) Unconditional Transfer Before Proof Filed. If a claim other than one based on a bond or debenture has been unconditionally transferred before proof of the claim has been filed, the proof of claim may be filed only by the transferee. If the claim has been transferred after the filing of the petition, the proof of claim shall be supported by (A) a statement of the transferor acknowledging the transfer and stating the consideration therefor or (B) a statement of the transferee setting forth the consideration for the transfer and why the transferee is unable to obtain the statement from the transferor.

(2) Unconditional Transfer After Proof Filed. If a claim other than one based on a bond or debenture has been unconditionally transferred after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the original claimant by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed with the clerk within 20 days of the mailing of the notice or within any additional time allowed by the court. If the court finds, after a hearing on notice, that the claim has been unconditionally transferred, it shall enter an order substituting the transferee for the original claimant, otherwise the court shall enter such order as may be appropriate.

(3) Transfer of Claim for Security Before Proof Filed. If a claim other than one based on a bond or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer. If the claim was transferred after the filing of the petition, the proof shall also be supported by (A) a statement of the transferor acknowledging the transfer and stating the consideration therefor, or (B) a statement of the transferee setting forth the consideration for the transfer and why the transferee is unable to obtain the statement from the transferor. If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by mail of the right to join in the filed claim. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. After a hearing on notice, the court shall enter such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the administration of the estate as may be appropriate.

(4) Transfer of Claim for Security After Proof Filed. If a claim other than one based on a bond or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the original claimant by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed with the clerk within 20 days of the mailing of the notice or within any additional time allowed by the court. After a hearing on notice, the court shall enter such orders respecting allowance and voting of the claim, payment of dividends thereon, and participation in the administration of the estate as may be appropriate.

(5) Service of Objection; Notice of Hearing. A copy of an objection to the evidence of transfer filed pursuant to paragraph (2) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferee at least 30 days prior to the hearing.

(f) Evidentiary Effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

(g) To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.

Bankruptcy Rule 7023.

CLASS PROCEEDINGS

Rule 23 F.R. Civ. P. applies in adversary proceedings.

Rule 9014.

CONTESTED MATTERS

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

No. 89-1310

IN THE

Supreme Court of the United States

October Term, 1989

PATRICK T. REID,
Petitioner,

v.

WHITE MOTOR CORPORATION and JOHN T. GRIGSBY, Jr.,
Disposition Assets Trustee of White Motor Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT JOHN T. GRIGSBY, JR., Disposition Assets Trustee of White Motor Corporation, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a person seeking to file a class proof of claim in a bankruptcy proceeding move pursuant to Bankruptcy Rule 9014 to apply Bankruptcy Rule 7023 after the bankruptcy court has granted the debtor's motion for summary judgment?

2. May a person who is not a member of the class of claimants he purports to represent file a class proof of claim in a bankruptcy proceeding?

3. Where a person attempts to file a "multiple claim" pursuant to Bankruptcy Rule 3001, must the person file the verified statement mandated by Bankruptcy Rule 2019?

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below in the Sixth Circuit were:

APPELLANT: Patrick T. Reid, Esq.

APPELLEE: John T. Grigsby, Jr., Disposition Assets Trustee of White Motor Corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *Reid v. White Motor Corp.* is reported at 886 F.2d 1462 (6th Cir. 1989), and is reprinted at page A-4 of Petitioner's Appendix. The opinion of the United States District Court for the Northern District of Ohio is reported at 65 Bankr. 383 (N.D. Ohio 1986), and is reprinted at page A-26 of Petitioner's Appendix. The opinion of the United States Bankruptcy Court for the Northern District of Ohio granting summary judgment in favor of Respondent is reprinted at page A-42 of Petitioner's Appendix. The opinion of that Bankruptcy Court denying Petitioner's post-trial motions is reprinted at page A-46 of Petitioner's Appendix.

JURISDICTION

Petitioner invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTES, FEDERAL RULES OF CIVIL PROCEDURE AND BANKRUPTCY RULES INVOLVED

This case involves the application of 11 U.S.C. §502, Federal Rule of Civil Procedure 23 and Bankruptcy Rules 2019, 3001, 7023 and 9014, all of which are reprinted in Petitioner's Appendix beginning at page A-48.

PRELIMINARY STATEMENT

On September 28, 1989 the United States Court of Appeals for the Sixth Circuit affirmed the decision of the Bankruptcy Court for the Northern District of Ohio in *In re White Motor Corp.*, Case No. B80-3361. That decision disallowed a purported class claim filed by Patrick T. Reid ("Reid"), an attorney, on behalf of former employees of the Diamond Reo Truck Division of White Motor Corporation ("WMC"). The basis for the Sixth Circuit's decision was Reid's total failure to comply with applicable bankruptcy rules.

In sum, Reid failed to move the Bankruptcy Court pursuant to Bankruptcy Rule 9014 to apply Bankruptcy Rule 7023 to the contested matter; Reid filed the class claim in his name despite the fact that he was not a member of the class and therefore could not be an adequate class representative; Reid failed to identify the class he purportedly represented; Reid failed to confirm his representational status; and, if, as Reid asserted for the first time in the Sixth Circuit, the claim was filed as a "multiple claim" rather than a "class claim," Reid failed to comply with Bankruptcy Rule 2019. The Sixth Circuit agreed with Reid that the bankruptcy rules permit class claims and agreed with Reid that the bankruptcy rules permit, in the alternative, multiple claims. The Sixth Circuit *did not* agree that Reid could ignore every applicable bankruptcy rule and yet pursue such claims.

Reid attempts to create a conflict among decisions from the Sixth, Seventh and Eleventh Circuits to support his Petition for Writ of Certiorari. The "conflicting" cases cited by Reid are entirely consistent with the Sixth Circuit's opinion. The decision below in favor of Respondent was tied to the unique facts of this case only and decided against Reid because he failed to comply with the bankruptcy rules. Thus, because there is no conflict within the circuits and the decision below was based upon the unique facts of the case before the Sixth Circuit, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case arose upon the filing of a purported class proof of claim by Patrick T. Reid, an attorney, in the Chapter 11 Bankruptcy of the White Motor Corporation in the Bankruptcy Court for the Northern District of Ohio. John T. Grigsby, the Respondent, is the Disposition Assets Trustee ("Trustee") of the Reorganization Trust established by the Reorganization Trust Agreement dated November 18, 1983 between Grigsby and WMC as mandated by the Chapter 11 Plan of Reorganization of WMC.[1] Claim No. 188 identified Reid as "the agent of all Class Members of a certain class action filed in the Ingham County Circuit Court, File No. 77-19932-CK. . . ." The class claimants were not identified on the proof of claim; there was no affidavit or other authorization for Reid to act in a representative status.

The proof of claim allegedly arose out of WMC's sale of its Diamond Reo Truck Division to Diamond Reo on August 16, 1971. At that time, all of the affected WMC employees were immediately employed by Diamond Reo. No claims for severance pay were made against WMC. In addition, in accordance with the terms of the WMC/ Diamond Reo Purchase Agreement, Diamond Reo assumed all of WMC's employment and labor contracts.

Diamond Reo was adjudicated bankrupt on May 3, 1975. Some Diamond Reo employees filed individual claims for severance pay against Diamond Reo. No employees sought severance pay from WMC.

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[1] The United States Bankruptcy Court for the Northern District of Ohio confirmed the Plan by Order entered on November 18, 1983. Pursuant to the Plan and Trust Agreement, the Reorganization Trust succeeded to certain assets of WMC and became responsible for liquidating and satisfying claims against WMC in accordance with the Plan under the Bankruptcy Code.

On February 21, 1977, just before the running of Michigan's seven year statute of limitations applicable to contract claims, Reid, a Michigan attorney who was not an employee of WMC or Diamond Reo, filed a class action against WMC on behalf of the WMC employees who had been employed in WMC's Diamond Reo Truck Division and then employed by Diamond Reo. *Burch v. White Motor Corp.*, Case No. 77-19932-CK (Mich. Cir. Ct., Ingham Cty. 1977). WMC asserted a number of defenses to the claim, including the immediate employment of the employees by Diamond Reo after the sale and the failure of the employees to file a claim against WMC until after Diamond Reo declared bankruptcy, thus foreclosing WMC from an indemnification claim against Diamond Reo under the Purchase Agreement.

WMC immediately filed a claim against the Diamond Reo bankruptcy estate. The Michigan state court certified the *Burch* class. Class members received notice of the suit and were required to "opt in" by January 30, 1980. At the time that WMC filed its Petition for Reorganization on September 4, 1980, counsel for WMC had not compiled a list of putative class members or their claims. Counsel for WMC took no further action on the *Burch* claim because of the automatic stay imposed by 11 U.S.C. §362. Reid did not attempt to have the stay lifted. The Michigan court dismissed the *Burch* complaint on July 12, 1983 for lack of progress, over a month *before* the WMC claims bar date of August 30, 1983.

In the meantime, on September 3, 1981, Reid filed a general unsecured claim against WMC. As stated *supra*, Reid filed the claim in his own name as an "agent" of members of the *Burch* class; he had no individual claim

against the estate. Reid amended the claim on June 29 and June 30, 1982 to increase the amount; other than that amendment, he took no action with respect to the claim.

WMC filed an objection to the claim on September 30, 1983, thereby making Claim No. 188 a contested claim. Reid still did nothing to advance his claim. He did not move the Bankruptcy Court to apply Bankruptcy Rules 9014 and 7023 to the contested matter; he did not file a motion for class certification; he did not ask to file any late individual claims.

On September 6, 1984 WMC filed a Motion for Summary Judgment in which the Trustee asserted, among other things, that:

> (1) A class proof of claim is inconsistent with the statutory requirement of individual proofs of claim;
>
> (2) Federal Rule of Civil Procedure 23 can be applied to a contested matter only upon motion to the Bankruptcy Court; and
>
> (3) Rule 23 could not be applied to Reid's claim as a matter of law because Reid was not a member of the class and hence not an adequate representative.

Reid still did not make any attempt to comply with applicable bankruptcy rules. Instead, Reid's opposition to the summary judgment was based upon the "collateral estoppel" effect of the certification of the *Burch* class by the Michigan court and his representation of the *Burch* class.

The Bankruptcy Court granted the Trustee's Motion for Summary Judgment, concluding, in part, that class claims are inappropriate in bankruptcy proceedings. Petitioner's Appendix at A-43. The Bankruptcy Court

also cited Reid's failure to move to apply Bankruptcy Rules 9014 and 7023 prior to the order granting summary judgment, failure to show he was authorized to file a class claim and failure to offer any reason for the court to extend the claims bar date. Importantly, the Bankruptcy Court stated that it could not rule in advance on the propriety of any individual request to file a late claim, leaving the door wide open for a "class" member who, in reliance on the *Burch* certification, did not file an individual claim.

No individual claims were filed. Instead, thirty-two days later, after the ten day appeal time had run, Reid filed three motions, styled as (1) a Motion for Reconsideration, (2) a Motion to Apply Rule 7023 to the Contested Proceeding, and (3) a Motion to Consider Claim Properly Filed by Individuals, to Permit Amendment of the Claim or to Permit the Filing of Late Individual Claims. The Bankruptcy Court overruled all three motions because Reid failed to raise any new legal or factual issues and because the "claims were not properly presented for adjudication. . . ." Petitioner's Appendix at A-47.

Reid appealed the Bankruptcy Orders of June 20, 1985 and September 11, 1985. The Trustee moved to dismiss the appeal of the June 20, 1985 Order as untimely and the September 11, 1985 order for failure to demonstrate abuse of discretion. The District Court granted the Trustee's motion on June 30, 1986. *In re White Motor Corp.*, 65 Bankr. 383 (N.D. Ohio 1986), reprinted at page A-26 of Petitioner's Appendix.

Through clerical error, the District Court's June 30, 1986 Order was docketed to a different WMC case. However, the Trustee received notice of the June 30,

1986 Order and, after the thirty day appeal time passed without Reid having filed an appeal, distributed to WMC creditors funds previously reserved for the Reid claim.

Sixteen months later, on October 30, 1987, the District Court issued a *nunc pro tunc* order applying its June 30, 1986 Order to the appropriate case. Reid appealed to the Sixth Circuit Court of Appeals from the October 30, 1987 Order.

The issues initially presented to the Sixth Circuit by Reid concerned (1) that court's jurisdiction to hear the appeal, (2) the appropriateness of class claims in Bankruptcy Court, and (3) Reid's compliance with bankruptcy procedures. When he filed his brief on the merits, however, Reid argued for the first time that his was *not* a class claim but a "multiple claim" properly filed by an agent of the individual claimants pursuant to Bankruptcy Rule 3001(b). This deliberate confusion of theories pervades Reid's Petition for Writ of Certiorari and becomes the basis for Reid's improvised "conflict within the circuits."

The Sixth Circuit agreed with Reid's jurisdictional arguments and agreed with Reid that class claims may be an appropriate vehicle for pursuing claims in bankruptcy. The court then examined whether Reid had (1) complied with the procedural requirements of pursuing a class claim as set forth in Bankruptcy Rules 9014 and 7023 or (2) based upon his newly-created "agency" theory, complied with the procedural requirements of Bankruptcy Rules 3001(b) and 2019. The Sixth Circuit properly disallowed Reid's claim because he "ignored every mandatory requirement" essential to complying with the bankruptcy rules. Petitioner's Appendix at A-21. The Sixth Circuit found that Reid:

> 1. "[F]ailed to confirm his representative capacity to represent a class;"

2. "[F]ailed to identify the class he purportedly represented;"

3. "[F]ailed to timely petition the bankruptcy court to apply the provisions of Rules 9014 and 7023;"

4. "Had no authorization designating him as a representative of the putative class;"

5. Lacked standing because he "was not a member of the class of former employees of WMC's Diamond Reo Truck Division;" and

6. Failed to file a verified statement with the Clerk of Bankruptcy Court as required by Bankruptcy Rule 2019.[2]

Petitioner's Appendix at A-21—A-23.

The decision of the Sixth Circuit in *Reid* is consistent with that of the Eleventh Circuit in *In re The Charter Co.*, 876 F.2d 866 (11th Cir.), *petition for cert. filed*, 58 U.S.L.W. 3291 (U.S. Oct. 31, 1989) (No. 89-579), *motion to defer consideration granted*, 110 S. Ct. 559 (1989), and that of the Seventh Circuit in *In re American Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988). All three circuits agree that class claims may be allowed in bankruptcy.[3] All three circuits agree that a

[2] The Dissent in *Reid* did not disagree with the majority's conclusions; the Dissent simply would have permitted an amendment of the claim (1) even though Reid had ignored all earlier opportunities to amend, (2) even though the amendment would come eight years after the filing of the Proof of Claim and eighteen years after the sale of the Diamond Reo Truck Division, (3) even though the Trustee, in good faith, relied upon the district court decision and distributed funds reserved for the claim, and (4) even though no individual claimant had attempted to file an individual claim despite the open door left by the Bankruptcy Court.

[3] As discussed *infra* at n.7, Reid may not seek review of the Tenth Circuit's opposing position as set forth in *In re Standard Metals Corp.*, 817 F.2d 625 (10th Cir.), *modified on other grounds sub nom. Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 201 (1988).

bankruptcy court has discretion under Rule 9014 not to apply Rule 7023 to a contested matter. The Sixth Circuit and the Eleventh Circuit agree that a motion under Rule 9014 to apply Rule 7023 must be made in a timely manner, the Eleventh Circuit concluding that such a motion is timely if filed after an objection to the claim is filed and the Sixth Circuit concluding that such motion is not timely if filed after summary judgment has been granted to the debtor. Finally, all three circuits agree that the filing of a Bankruptcy Rule 2019 disclosure statement is not required where a *true class proof of claim* is filed.

Giving Reid full benefit of any doubt by considering his newly-concocted "multiple claim" argument, the Sixth Circuit went beyond *In re The Charter Co.* to consider the situation where there is no true class proof of claim and the claimant argues the application of Bankruptcy Rules 3001(b) and 2019.[4] The Sixth Circuit applied the mandate of Rule 2019 that an agent filing a multiple claim "shall" file a verified statement "with the clerk of the bankruptcy court delineating his authority to act as an agent for any purported class." Petitioner's Appendix at A-22. This holding is not in conflict with any case cited by Petitioner and is simply an application of the bankruptcy rules. Thus the decision of the Sixth Circuit is consistent with the recent case law with

[4] There was no issue in *In re The Charter Co.* or *In re American Reserve Corp.* about the propriety of the class representation. Unlike the instant situation the plaintiff in each of those cases was a member of the class and did not raise a "multiple claim" argument.

respect to class claims in bankruptcy. Reid seeks review of a decision which is adverse to him because of the unique facts before the Court which stem from his failure to follow clearly delineated bankruptcy procedures.[5] For these reasons, Respondent requests that the Petition be denied.

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[5] Reid attempts an equity argument by quoting language from an examiner's report in the WMC bankruptcy. See Petition for Writ of Certiorari at 20-21. Reid fails to tell this Court that the examiner's report quoted has nothing to do with the Diamond Reo bankruptcy which underlies Reid's claim. Instead, the report pertains to the WMC proceeding filed in 1980. The employees referenced in the report are *not* the putative claimants in this action. They were WMC employees at the time of the WMC reorganization and, unlike the claimants here, were not re-employed by WMC after the reorganization. Reid's claimants were employed immediately by Diamond Reo upon the sale of the Truck Division. Presumably these Diamond Reo employees pursued claims for severance benefits against Diamond Reo in the Diamond Reo bankruptcy.

Further undercutting Reid's equity argument is the fact that none of the "class" members ever came forward to file an individual claim after Reid's "class claim" was disallowed and after the Bankruptcy Court invited individual motions to file late claims.

REASONS WHY THE PETITION SHOULD BE DENIED

Reid's initial brief in the Court of Appeals argued that his claim was *not* a class proof of claim. Rather, he argued that it was a "multiple claim" filed pursuant to Bankruptcy Rule 3001(b). In his reply brief to the Sixth Circuit, however, Reid changed his position again and argued that the claim was properly filed as a class claim. Now, having succeeded in persuading the Court of Appeals to recognize that class proofs of claim are allowable, Reid argues that the Sixth Circuit's decision is in conflict with decisions from the Courts of Appeal for the Seventh and Eleventh Circuits. On review, however, it is clear that no such conflict exists. Each of the decisions cited by Reid is consistent in that each recognizes and allows the filing of class proofs of claim. Moreover, the decision of the Sixth Circuit turns upon and is limited by its own facts arising from Reid's failure to follow applicable bankruptcy rules. What Reid is seeking from this Court amounts to a practitioner's guide to class claims. See Petition at 6-7. However, further review by this Court will serve no important purpose and will not serve to clarify the already clear procedural requirements for filing class claims (and multiple claims) in bankruptcy.

THE PROCEDURAL REQUIREMENTS ESTABLISHED BY THE SIXTH, SEVENTH AND ELEVENTH CIRCUITS FOR FILING CLASS PROOFS OF CLAIM ARE CONSISTENT. THERE IS NO NEED FOR FURTHER CLARIFICATION BY THIS COURT.

Class proofs of claim have only recently been recognized in bankruptcy proceedings. The first appellate decision[6] directly considering class proofs of claim was *In re Standard Metals Corp.*, 817 F.2d 625 (10th Cir.), *modified on other grounds sub nom. Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 201 (1988). In *In re Standard Metals*, the Tenth Circuit refused to allow class proofs of claim. Since *In re Standard Metals*, however, the Sixth, Seventh and Eleventh Circuits have recognized and allowed the filing of class proofs of claim.[7] *See In re American Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988); *In re The Charter Co.*, 876 F.2d 866 (11th Cir. 1989); *Reid v. White Motor Corp.*, 886 F.2d 1462 (6th Cir. 1989).

As the Eleventh Circuit explained in *In re The Charter Co.*, the procedures for incorporating Federal Rule of Civil Procedure 23 into bankruptcy proceedings

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[6] The Eleventh Circuit in *In re GAC Corp.*, 681 F.2d 1295 (11th Cir. 1982), did not decide the issue of whether class proofs of claim are allowable in bankruptcy proceedings:

> We need not and do not decide the issue whether a class proof of claim is ever allowable in a Chapter X proceeding, however, for even if we assume *arguendo* that class claims are allowable, Novak failed to follow any of the procedures required to prosecute a class action.

In re GAC Corp., 681 F.2d at 1299.

[7] Petitioner appears to argue that even though the issue of the propriety of class claims in bankruptcy was decided in his favor below, he may raise the conflict between the Tenth Circuit, on the one hand, and the Sixth, Seventh and Eleventh Circuits, on the other hand, to support his Petition. See Petition at 8. By so doing, Petitioner seeks an advisory opinion from this Court.

are contained in the bankruptcy rules. Under Bankruptcy Rule 9014, the bankruptcy court, in its discretion, may apply Rule 7023 (and by extension Fed. R. Civ. P. 23) in a contested matter. *In re The Charter Co.*, 876 F.2d at 873. A filed proof of claim does not become a contested matter until an objection to the claim has been made. Once an objection has been made, the class representative must move under Rule 9014 to request application of Rule 7023. *Id.* at 874.

The Eleventh Circuit held that a claimant seeking to act as a class representative must promptly move under Bankruptcy Rule 9014 to invoke Bankruptcy Rule 7023. *Id.* The class representative in *In re The Charter Co.* did exactly that; once the debtor objected to the claim, the class representative "promptly moved under Bankruptcy Rule 9014 to invoke [Bankruptcy Rule] 7023." *Id.* By comparison, Reid's motion pursuant to Rule 9014 to invoke Rule 7023 was filed twenty-two months after the Trustee's objection. The Sixth Circuit's decision below endorsed the Eleventh Circuit's requirement of a "prompt" motion under Rule 9014 and distinguished Reid's belated attempt to invoke Rule 9014 and Rule 7023:

> In *In re The Charter Co.*, the appellants had filed a motion pursuant to Rule 9014 to invoke Rule 7023 *immediately after the trustee objected to their class proof of claim.* In contrast, Reid filed a motion pursuant to Rule 9014, on July 22, 1985, *after the bankruptcy court had granted the Trustee's motion for summary judgment* dismissing Reid's purported class proof of claim.

Petitioner's Appendix at A-21 n.13 (emphasis added).

Read together, the Sixth Circuit's decision below and the Eleventh Circuit's decision in *In re The Charter Co.* establish that to be considered timely, a motion under Rule 9014 to invoke Rule 7023 is "prompt" if made after an objection has been filed to the class proof of claim. A motion to apply Rule 7023 made after judgment has been entered—such as that filed by Reid—will be untimely. Both courts held that where the party seeking to act as a class representative fails to invoke promptly Rule 7023, there can be no abuse of discretion in refusing to apply Rule 7023.

Because the procedural requirements for invoking Bankruptcy Rule 7023 in a class claim proceeding are clear and there is no conflict between the decision of the court below and the other courts of appeal, the Petition for a Writ of Certiorari should be denied.

THE SIXTH CIRCUIT'S DETERMINATION THAT REID'S "MULTIPLE CLAIM" WAS PROPERLY DISALLOWED BECAUSE OF HIS FAILURE TO COMPLY WITH RULE 2019 DOES NOT CONFLICT WITH THE DECISIONS OF THE SEVENTH AND ELEVENTH CIRCUITS.

One of the grounds for the Bankruptcy Court's rejection of Reid's "class claim" argument was that Reid was not a member of the class and, therefore, could not serve as the class representative. Petitioner's Appendix at A-43—A-44. Apparently recognizing this would be a fatal flaw in his class claim, Reid raised for the first time before the Sixth Circuit the "alternative" position that his was not a class claim but a "multiple claim" authorized by Bankruptcy Rule 3001(b). The Sixth Circuit addressed Reid's alternative "multiple claim" argument and once again required that he follow the mandates of the bankruptcy rules. The Sixth Circuit held that Reid, as an attorney representing the class and not a member of the class, failed to file the verified statement required by Rule 2019 setting forth his authority to act as an agent for the purported class.[8] Petitioner's Appendix at A-22. Despite Reid's contentions, the Sixth Circuit's holding on this issue does not conflict with the decisions of the Seventh and Eleventh Circuits.

The requirements of Bankruptcy Rule 2019 are mandatory. Bankruptcy Rule 2019(a) requires that every person purporting to represent more than one creditor "*shall*" file a verified statement with the clerk of the bankruptcy court stating the names and addresses of the

[8] At the time of the filing of Reid's claim, the applicable rule was Chapter X Rule 10-211, which was essentially the same as current Bankruptcy Rule 2019(a).

creditors, the nature and amount of their claims, when the claims were acquired, and the relevant facts and circumstances in connection with the employment of the agent. Rule 2019 further requires the purported agent to file a copy of the instrument empowering the agent to act on behalf of the creditors he is representing. See Petitioner's Appendix at A-22.

In *In re American Reserve Corp.*, the Seventh Circuit did not directly address Rule 2019. Indeed, Reid concedes as much in his Petition for Writ of Certiorari. See Petition at 15. The Seventh Circuit simply recognized that where a *true class action* exists, *i.e.*, a claim commenced by a class representative who is a member of the class and who has standing to represent a class, certification of the class by the bankruptcy court satisfies the purposes of Rule 2019. *In re American Reserve Corp.*, 840 F.2d at 493. However, because Reid was not a member of the class he purported to represent, his claim was not a "true Rule 23 class action," and he was required by Bankruptcy Rule 2019 to file a verified statement setting forth his authority to act as an agent for the class.

Similarly, the Eleventh Circuit's decision in *In re The Charter Co.* does not support Reid's claim of a conflict within the circuits. The Eleventh Circuit recognized, like the Seventh Circuit in *In re American Reserve Corp.*, that the bankruptcy court's certification of a class is all that is necessary to comply with the purposes of Rule 2019. *In re The Charter Co.*, 876 F.2d at 875 n.14. What Reid fails to explain in his Petition is that the class representatives in both *In re American Reserve Corp.* and *In re The Charter Co.* were members of the classes they sought to represent. Thus, given the timely filing of a motion to apply Rule 7023 and certification of the class, the application of Rule 2019 was not an issue.

In contrast, Reid was not a member of the class of former employees he sought to represent and had not filed a timely motion to apply Rule 7023. If instead of relying upon an improper class claim Reid sought to file a "multiple claim," he was required to adhere to the mandates of Rule 2019 and cannot bootstrap the holdings of *In re The Charter Co.* and *In re American Reserve Corp.* to escape his blatant avoidance of the rule.

The simple and consistent rule of the Sixth, Seventh and Eleventh Circuits is as follows: If a true class claim is filed so that a class may be certified, there is no requirement that the class representative comply with Rule 2019. If, as with the *Reid* case, there is no true class claim filed and no class may be certified, the "agent" for the class must comply with the mandate of Rule 2019.[9]

[9] As discussed *supra*, the Sixth Circuit disallowed Reid's class claim because, *inter alia*, he was not a member of the class he purported to represent. Petitioner's Appendix at A-22. Reid persists in arguing, however, that his authorization to represent the class in the *Burch* litigation was all that was needed to file the proof of claim in the WMC bankruptcy. The Sixth Circuit rejected this argument as being "less than persuasive." *Id.* at A-23. "It is well-settled that consent to being a member or the representative of a class in one piece of litigation is not tantamount to a blanket consent to any litigation the class counsel may wish to pursue." *Id.* (quoting *In re Standard Metals Corp.*, 817 F.2d at 631). Although Reid appears to disagree with the Sixth Circuit's resolution of this issue, his Petition for Writ of Certiorari does not raise the issue for this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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